Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

UIS, INCORPORATED,
Petitioner,

v.

INTERKAL, INC.; SUMITOMO MARINE & FIRE INSURANCE CO. (JAPAN), LTD.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Does a plaintiff who invokes federal diversity jurisdiction fail to carry the burden of establishing that the value of its breach of contract claim exceeded the minimum jurisdictional amount specified by 28 U.S.C. § 1332 (a)(1) where an applicable state rule of law, as applied to the terms of an unambiguous written contract, limited the amount plaintiff was entitled to recover to less than the minimum jurisdictional amount?

May "bad faith" in alleging a possible recovery in excess of the minimum jurisdictional amount specified by 28 U.S.C. § 1332 (a)(1) be inferred from extreme speculativeness of a claim for recovery of contract damages in contravention of a governing state law rule or measure of damages?

PARTIES TO THE PROCEEDING

Petitioner, UIS, Inc., and its attorneys, Edward A. Hannan and Hannan, Siesennop & Sullivan, 200 North Jefferson Street, Milwaukee, WI 53202, and Richard J. McClear and Dykema Gossett, 400 Renaissance Center, Detroit, MI 48243-1668, appeared before the Sixth Circuit Court of Appeals as defendant-appellant.

As a result of a corporate restructuring effective December 31, 1996, Petitioner UIS, Inc., became a wholly owned subsidiary of UIS Industries, Inc. All of the subsidiaries of UIS, Inc. are wholly owned, excepting Eurofilter (Air Filters) Limited, a U.K. corporation.

Respondent, Interkal, Inc., and its attorneys, Charles E. Ritter and Miller, Canfield, Paddock & Stone, P.L.C., 444 West Michigan Avenue, Kalamazoo, MI 49007-3752, appeared before the Sixth Circuit Court of Appeals as plaintiff-respondent.

In addition, Sumitomo Marine Management (U.S.A.), Inc., and its attorneys, Jeffrey R. DeCaro and DeCaro, Doran, Siciliano, Gallagher, Sonntag & Deblasis, P.O. Box 40, Lanham, MD 20703-0040 appeared as plaintiff before the United States District Court for the Western District of Michigan.

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UIS, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, A1-A10) is not reported. The opinions of the district court (App. B, A11-A12; App. C, A13-A19; App. D, A20-A21) are not reported.

JURISDICTION

The court of appeals entered its judgment on December 3, 1997. (App. A, A1-A10). The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 1332(a)(1)(1994), provides that the "district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between citizens of different States...."

STATEMENT OF THE CASE

In April, 1994, Respondent, Interkal, Inc. and its liability insurer, Sumitomo Marine Management (U.S.A.), Inc., commenced this action against petitioner, UIS, Inc. before the United States District Court for the Western District of Michigan, invoking federal diversity jurisdiction pursuant to 28 U.S.C § 1332(a)(1)(1988). In addition and pursuant to 28 U.S.C. 1367 (a) (1994), Interkal, Inc., also invoked jurisdiction supplemental to the diversity jurisdiction asserted by Sumitomo Marine Management (U.S.A.), Inc. (App. G at A42).

Sumitomo Marine Management (U.S.A.), Inc., in its capacity as alleged partial subrogee of its insured, Interkal, Inc., sought to recover from UIS, Inc. approximately $382,500 paid on behalf of Interkal, Inc. in indemnity and defense expenditures with respect to a prior personal injury action. (App. G at A49) Interkal, Inc. sought a declaration of rights under an indemnification clause expressed in a written asset purchase agreement entered into in 1981 between UIS, Inc. and a predecessor of Interkal, Inc. *Id.* Also, Interkal, Inc. sought to recover from UIS, Inc. sums asserted to be due under the subject indemnification clause. (App. G at A39-A52) The entire, express asset purchase agreement was appended to the complaint as an exhibit. (App. G at A53-A83) Michigan's substantive and remedial law governs the parties' rights and remedies. (App. G at A82)

Plaintiff, Sumitomo Marine Management (U.S.A.), Inc asserted itself to be a "New Jersey corporation with its principal place of business located in Warren, New Jersey." (App. G at A40). Plaintiff, Interkal, Inc. asserted itself to be a "Michigan corporation with its principal place of business located in Kalamazoo, Michigan." (App. G at A40) Defendant, UIS, Inc., is and was asserted to be a "New York

corporation with its principal place of business located in New York, New York." (App. G at A41) Respecting federal subject matter jurisdiction, plaintiffs asserted:

> Jurisdiction is based on 28 U.S.C. § 1332(a) because there is diversity of citizenship of the parties and the amount in controversy, with respect to each plaintiff separately and both plaintiffs together, exceeds the sum of Fifty thousand ($50,000.00) Dollars. Jurisdiction over Interkal's claims is also based on 28 U.S.C. § 1367(a) because Interkal's claims are so related to Sumitomo's claims that they form part of the same case or controversy. (App. G at A42)

As to damages, in addition to those sought by Sumitomo Marine Management (U.S.A.), Inc., Interkal, Inc. asserted:

> As a result of the failure and refusal of UIS to defend and indemnify Interkal in connection with the Charles County, Maryland bleacher cases referred to above, Interkal has incurred attorneys fees and expenses in the amount of $22,297.52 in assisting Sumitomo and UIS under the terms of the Agreement, notwithstanding UIS's breach of the Agreement. Also, Interkal incurred in-house expense in the amount of $5,100.00 in fabricating and shipping a demonstration bleacher for use at trial in Maryland which should be reimbursed by UIS under the terms of the Agreement. Finally, the refusal of UIS to defend and indemnify Interkal has, on information and belief, resulted in a significant

> increase in its insurance premiums which increase is expected to continue into the future regardless of the outcome of this litigation. (App. G at A49)

The parties filed cross motions for summary judgment before the district court. On April 26, 1995, the District Court heard and decided the cross motions. (App. J, A98-A100) The district court determined that the indemnification provisions of the asset purchase agreement appended to plaintiffs' complaint were clear and unambiguous and that Defendant-Petitioner was obliged to indemnify Interkal with respect to losses sustained as a result of the Maryland action. (App. J at A100) A trial on the issue of the amount of loss sustained was then set.

A few days before the start of trial, in the course of conducting an evidentiary deposition for use at trial, UIS, Inc. discovered through the testimony of an officer of Sumitomo Marine Management (U.S.A.), Inc. that the corporation had misrepresented its corporate citizenship. In fact, Sumitomo Marine Management (U.S.A.), Inc. always was a New York corporation, whose principal place of business was New York, New York. (App. E and App. F, A22-A38) Accordingly, at the time of commencement of the action, incomplete diversity of citizenship existed between plaintiff, Sumitomo Marine Management (U.S.A.), Inc., and UIS, Inc. On the first day of trial, counsel for UIS, Inc. advised the district court that a potential defect in its subject matter jurisdiction existed because Sumitomo Marine Management (U.S.A.), Inc. was non-diverse as to UIS, Inc. Since Sumitomo Marine Management (U.S.A.), Inc. was not diverse as to UIS, Inc. supplemental jurisdiction under 28 U.S.C. § 1367(a) was not available to Interkal, Inc. Also, UIS, Inc.'s counsel advised the district court that, due to

controlling Michigan law, the value of the amount in controversy as to Interkal, Inc. was less than $50,000. Controlling Michigan law recognizes the "foreseeable consequences" limitation on recovery of contract damages and, as a result, Interkal's claim for recovery of "increased insurance premiums" was barred as a matter of law. (App. E at A34). Without the claim for "increased insurance premiums", Interkal's damages, excluding interest and costs, amounted only to $27,397.52. (App. G at A49)

Following testimony from an officer of Sumitomo Marine Management (U.S.A.), Inc. confirming that the corporation was a New York corporation and that the company issuing the liability policy to Interkal may be a Japanese corporation, the district court adjourned trial on the merits. The district court granted Interkal, Inc. an option either to voluntarily dismiss the action without prejudice, or to substitute the Japanese corporation for Sumitomo Marine Management (U.S.A.), Inc.

Interkal, Inc. moved to either substitute Sumitomo Marine and Fire Insurance Company, Limited of Japan for Sumitomo Marine Management (U.S.A.), Inc., or, alternatively, to "drop" Sumitomo Marine Management (U.S.A.), Inc. as a party plaintiff.

Following discovery of the jurisdictional issues, UIS, Inc. moved the district court to enter an order dismissing the action without prejudice for want of federal subject matter jurisdiction. UIS, Inc. asserted that at the time of filing the action, incomplete diversity of citizenship existed between UIS, Inc. and Sumitomo Marine Management (U.S.A.), Inc.; Sumitomo Marine Management (U.S.A.), Inc., not Sumitomo Marine and Fire Insurance Company Limited of Japan, was the real party in interest; and, the value of the amount in controversy as to Interkal, Inc. was less than $50,000.00

because controlling Michigan law did not permit a claim for "increased insurance premiums."

The district court granted Interkal, Inc.'s motion to dismiss Sumitomo Marine Management (U.S.A.), Inc. as a dispensable, non-diverse party . The district court denied UIS, Inc.'s motion to dismiss, concluding that Interkal, Inc. had asserted "in good faith" a claim exceeding $50,000 in value. The district court then allowed Interkal, Inc. to amend its complaint to assert the claims of Sumitomo Marine & Fire Insurance Company Limited of Japan. (App. C at A14-A18; App. H, A84-A96)

At the close of the evidence at trial UIS, Inc. moved the district court pursuant to Rule 52(c), Fed. Rules. Civ. Pro., among other matters, for judgment dismissing the claim of Interkal, Inc. for "increased insurance premiums" upon the grounds not only that "increased insurance premiums" were not contemplated by the parties' written agreement, but also, upon the additional ground that Interkal's proof at trial on this issue was speculative. The district court granted UIS, Inc.'s motion and found that these alleged "losses, whether speculative or not, were not within the contemplation of the parties' agreement in fact as expressed in the 1981 asset purchase agreement, and the defendant's [UIS, Inc.'s] motion for partial judgment with respect to these claims of the plaintiff is granted." (App. F at A37)

The district court entered judgment in favor of Interkal, Inc. on its own claims in the sum of $20,005.07. The district court entered judgment for Interkal on the "claim(s) asserted on behalf of Sumitomo Marine & Fire" for $379,172.33. (App. B, A11-A12)

UIS, Inc. timely appealed the district court judgment to the Sixth Circuit Court of Appeals. On December 3, 1997,

the court of appeals entered its judgment affirming the district court judgment. (App. A, A1-A10) In rejecting UIS, Inc.'s jurisdictional argument, the court of appeals held:

> A federal district court has original jurisdiction over diversity cases "only where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs." 28 U.S.C. § 1332(a)(1996) (sic) The only basis for federal court jurisdiction in this case is diversity of citizenship.
>
> The appellant argues that the appellee's claim for damages for increased insurance premiums were not recoverable as a matter of Michigan law and therefore could not be used in determining if the jurisdictional amount was satisfied, making the complaint insufficient on its face in terms of satisfying the minimum amount-in-controversy. The appellant bases its contention that the appellee's claim for damages for increased insurance premiums is prohibited as a matter of Michigan law on the established rule that breach of contract damages are recoverable only for those damages that either arise naturally from the breach or were contemplated by the parties at the time the contract was made. *See Kewin v Mass. Mut. Life Ins. Co.*, 295 N.W.2d 50, 52-53 (Mich. 1980). The appellant reasons that damages for increased insurance premiums were not contemplated by the parties as evidenced by the absence from explicit terms of the asset purchase agreement, and thus were prohibited as a matter of Michigan law,

making the amount sought in damages ineligible for satisfying § 1332. The argument fails. The damages are not prohibited *per se*. Rather, the issue is one of contract interpretation. As the matter is an issue of contract interpretation, it is not apparent "to a legal certainty" that that the appellee could never recover the contract damages for increased insurance premiums. *See Knox Exploration Corp.*, 2 F.3d at 182. "[T]he legal impossibility of recovery must be so certain as to virtually negative the plaintiff's good faith in asserting the claim. If the right of recovery is uncertain, the doubt should be resolved...in favor of the subjective good faith of the plaintiff." *Tongkook American, Inc. v Shipton Sportswear Co.*, 14 F.3d 781,785 (2d.Cir.1994)(quoting *McDonald v. Patton*, 240 F.2d 424, 426 (4th.Cir. 1957)). The fact that the appellee's claim for increased insurance premiums was eventually found to have an insufficient evidentiary support is irrelevant to its role in satisfying the amount-in-controversy requirement. *See Klepper v. First American Bank, Inc.*, 916 F.2d at 341. Accordingly, we find that the district court properly had jurisdiction of this case. (App. A at A6-A7).

REASONS TO GRANT THE PETITION

REVIEW OF THE JUDGMENT OF THE COURT OF APPEALS IS NECESSARY TO HARMONIZE OPINIONS OF THE COURT OF APPEALS ON AN IMPORTANT QUESTION IMPACTING FEDERAL-STATE RELATIONS: POLICING THE LIMITED SCOPE OF SUBJECT MATTER JURISDICTION OF THE FEDERAL JUDICIARY.

Maintaining The Limited Scope Of Federal Subject Matter Jurisdiction Is An Important Question.

Preserving and enforcing the limited jurisdiction of the federal courts is a fundamental concern. *See Mitchell v. Maurer*, 293 U.S. 237, 244, 55 S.Ct. 162, 79 L.Ed. 338 (1934). Maintaining the limited jurisdiction of the federal courts is necessary not only to preserve the general jurisdiction of the several state courts, *Healy v. Ratta*, 292 U.S. 263, 269-270, 54 S.Ct. 700, 78 L.Ed 1248 (1933), but also to preserve and effectively use the limited resources of the federal judiciary. *See Snyder v. Harris,* 394 U.S. 332, 339-340, 89 S.Ct. 1053, 22 L.Ed. 2d 319(1969). The value of the amount in controversy is an important definitional limit on the scope of federal judicial power, particularly in diversity cases. *Id.*, at 394 U.S. 340; *Healy v. Ratta,* supra.; and see: *Packard v. Provident Nat'l Bank*, 994 F.2d 1039, 1044-1045 (3d. Cir.), *cert. denied,* ___U.S.___, 114 S.Ct.440, 126 L.Ed.2d 373 (1993). From the inception of this republic, Congress has chosen to limit access to the federal judiciary by imposing a minimum monetary value on

the amount in controversy. *Snyder v. Harris*, supra., 394 U.S. at 339. Where, as here, a plaintiff chooses to bring a civil action in federal court, the plaintiff carries the burden of both pleading and proving a claim having a value in excess of the minimum jurisdictional amount. *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 290, 58 S.Ct. 586, 82 L.Ed. 845 (1938). When the value of the amount in controversy of a claim initiated in a federal forum is challenged, plaintiff carries the burden of proving that the value of the amount in controversy exceeds the jurisdictional minimum. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 179, 56 S.Ct. 780, 80 L.Ed. 1135 (1936); *KVOS, Inc. v. Associated Press*, 299 U.S. 269, 277-278, 57 S.Ct. 197, 81 L.Ed. 183 (1936).

The Court Of Appeals Opinion Conflicts With The Dictate Of *St. Paul Mercury Indemnity Co. v Red Cab. Co.* 303 U.S. 283 (1938), And Opinions Of Other Courts Of Appeals, Including Prior Opinions Handed Down By The Sixth Circuit.

Six of the Circuit Court of Appeals have held or implied that a district court must dismiss a civil action for want of subject matter jurisdiction where a valid and enforceable express limitation of liability clause in a contract, or an applicable state statute limits damages to a sum less than the jurisdictional minimum. *Sanchez-Arroyo v. Eastern Airlines, Inc.*, 835 F.2d. 407 (1st Cir. 1987); *Valhal Corp. v. Sullivan Associates, Inc.*, 44 F.3d. 195 (3rd Cir. 1995); *Sellers v. O'Connnell*, 701 F.2d 575 (6th Cir. 1983); *Pratt Central Park Limited Partnership v. Dames & Moore, Inc.* 60 F.3d 350 (7th Cir. 1995); *Pachinger v. MGM Grand Hotel Las Vegas, Inc.*, 802 F.2d 362 (9th Cir. 1986); *Kalpakian v. Oklahoma Sheraton Corp.*, 398 F.2d 243 (10th Cir. 1968).

These opinions hold or imply that where a valid and enforceable limitation of liability clause or state statute limits recoverable damages to a sum less than the jurisdictional amount, then it is a "legal certainty" that the contract claim at issue cannot be adjudicated in the federal courts. Also, the Sixth Circuit Court of Appeals has held that where a governing common law rule precludes recovery of a claimed element of damages, an absence of the minimum jurisdictional amount to a "legal certainty" exists, notwithstanding a concession that the pleadings had asserted the claimed element of damage in "good faith." See: *Sellers v O'Connell*, 701 F.2d 575(6th Cir. 1983); *Parmelee v. Ackerman*, 252 F.2d 721 (6th Cir. 1958).

UIS, Inc. respectfully asserts that the judgment of the court of appeals below not only conflicts with this court's decision in *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 288-289, 58 S.Ct. 586, 82 L.Ed. 845 (1938), but also the above-referenced decisions which hold or imply that where a governing rule of law limits the amount of recovery to less than the jurisdictional minimum, then the value of the amount in controversy is less than the jurisdictional minimum "to a legal certainty."

The ultimate test handed down by *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 288-289, 58 S.Ct. 586, 82 L.Ed. 845 (1938) is that "unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith..." The opinion does not distinguish between controlling *substantive law* and controlling *remedial law*; rather the opinion refers to "the law." The law of judicial remedies is an essential component of the common law. See generally: DOBBS, HANDBOOK ON THE LAW OF REMEDIES (1996); RESTATEMENT, CONTRACTS (Second) § 352 (1981). A judicial

interpretation of unambiguous contract terms is a question of law, not one of fact. e.g: *Church v. General Motors* Corp., 74 F.3d 795, 798-799 (7th Cir. 1996); *Technical Consultant Serv. Inc v. Lakewood Pipe, Inc.*, 861 F.2d 1357, 1362 (5th Cir. 1988)(applying Texas law); accord: *Tennessee Consolidated Coal Co. v. United Mine Workers of America*, 416 F.2d 1192, 1198 (6th Cir 1969) *cert. den* 397 U.S. 964 (1970). Where, as here, contract terms are unambiguous, application of the "foreseeable consequences" limitation on recovery of contract damages presents only a question of law. See: *Isagaholian v Transamerica Ins. Corp*, 208 Mich. App. 9,17, 527 N.W. 2d 13, 17 (1994). In this case, controlling Michigan remedial law recognizes the "foreseeable consequences" limitation on recovery of contract damages. *Kewin v Massachusetts Mutual Life Ins. Co.*, 409 Mich. 401, 414-415, 295 N.W.2d 50 (1980). Here, in granting UIS, Inc.'s Rule 52(c) motion, the district court determined that Michigan remedial law as applied to unambiguous contract terms limited the value of the amount in controversy as to Interkal's claim, excluding interest and costs to $20,005.07. (App. B at A-11 & A-12). Axiomatically, a determination of a "question of law" must be a conclusion of law. Accordingly, Michigan law determined that the value of the amount in controversy as to Interkal's claim was less than the jurisdictional amount.

UIS, Inc. respectfully asserts that the court of appeals' reasoning adds an unwarranted gloss to the test this court handed down in *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 288-289, 58 S.Ct. 586, 82 L.Ed. 845 (1938): "unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith...." There is no functional difference between capping damages at a sum less than the jurisdictional minimum by applying an express contractual limitation, a statutory limit or by applying a governing state common law

rule limiting damages. Nor is there any functional difference between applying a rule of law to limit the value of the amount in controversy and accepting a plaintiff's concession on the value of the amount in controversy. See: *Jones v. Knox Corporation*, 2 F.3d 181,182 (6th Cir. 1993); *Tongkook America, Inc. v Shipton Sportswear Co.*, 14 F.3d. 781, 785 (2nd Cir. 1994); *American Mutual Liability Ins. Co. v. Campbell*, 329 F.Supp 1283 (N.D. Ga. 1971). In each circumstance, the minimum value was not in controversy at the time of commencement of the action to a "legal certainty." One federal district court has recognized that the 'foreseeable consequences' limitation on recovery of contract damages defines the value of the amount in controversy for purposes of federal subject matter jurisdiction See: *Roberson v Dale*, 464 F.Supp. 680, 683 (D.N.C. 1979). Uniformity of standards and of application of standards on matters touching on the proper scope of federal subject matter jurisdiction should be an issue of paramount concern for defining the proper role of the federal judiciary and of the proper administration of the affairs of the federal judiciary.

An Objective Test For Distinguishing Between A Presuit Condition Which Establishes That The Value Of A Claim is Less Than The Jurisdictional Minimum and A "Subsequent Condition" Which Does Not Impact The Exercise Of Jurisdiction Is Necessary To Properly Define The Scope Of Federal Judicial Power.

The test for setting the value of the amount in controversy was established by *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 288-290, 58 S.Ct. 586, 82 L.Ed. 845 (1938):

The intent of Congress drastically to restrict

federal jurisdiction in controversies between citizens of different states has always been rigorously enforced by the courts. The rule governing dismissal for want of jurisdiction in cases brought in the federal court is that, unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal. The inability of plaintiff to recover an amount adequate to give the court jurisdiction does not show his bad faith or oust the jurisdiction. Nor does the fact that the complaint discloses the existence of a valid defense to the claim. But if, from the face of the pleadings, it is apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed, or if from the proofs, the court is satisfied to a like certainty that the plaintiff never was entitled to recover that amount, and that his claim was therefore colorable for the purpose of conferring jurisdiction, the suit will be dismissed .... In a cause instituted in the federal court the plaintiff chooses his forum. He knows or should know whether his claim is within the statutory requirement as to amount. His good faith in choosing the federal forum is open to challenge not only by resort to the face of his complaint, but by the facts disclosed at trial, and if from either source it is clear that his claim never could have amounted to the sum necessary to give jurisdiction, there is no injustice in dismissing the suit.

The distinction drawn by *St. Paul Mercury Indemnity* between a presuit condition limiting the value of the amount in controversy and a "subsequent event" reducing a damage award is clearly stated, but difficult to apply. A neutral test for objectively distinguishing between presuit conditions which limit value and "subsequent events" which reduce damages would greatly assist the lower courts and the bar. *See Deutsch v. Hewes Street Realty Corp.*, 359 F.2d 96, 98 (2d.Cir. 1966)("[W]ith mounting federal case loads,...it has become doubly important that the district courts take measures to discover those suits which [do not belong in a federal court] and to dismiss them when the court is convinced to a legal certainty that plaintiff cannot recover an amount in excess of [the minimum statutory jurisdictional amount.]")

Defendant-Petitioner respectfully submits that the undisputed facts of this case, as found by the district court and as affirmed by the court of appeals, present this court with an important opportunity for articulating an objective test for distinguishing between conditions existing before the commencement of a civil action which demonstrate to "a legal certainty" that plaintiff never was entitled to recover a sum exceeding the jurisdictional minimum and "events" occurring "subsequent" to the filing of an action which do not impact jurisdiction. Articulating such a test will provide important guidance to all lower courts on a fundamental issue affecting the business of the federal judiciary: the scope of its jurisdiction. Such guidance should have the salutary effects of preserving future judicial resources by eliminating or reducing grounds for disputes and fostering uniformity among the several circuit courts of appeal in gauging the value of an amount in controversy for purposes of federal subject matter jurisdiction.

The Undisputed Facts Of This Case Render This Case Appropriate For Establishing A Test To Distinguish Between The Presuit Condition Limiting The Value Of An Amount In Controversy To A Sum Less Than The Jurisdictional Minimum And The Inconsequential "Subsequent Event" Reducing The Amount Recovered To Less Than The Jurisdictional Minimum.

This case squarely raises the question whether the same result should obtain upon application of a governing state common law rule limiting a measure of contract damages. Here, the jurisdictional issue arose upon discovery that a plaintiff, Sumitomo Marine Management (U.S.A.), Inc., who unquestionably had a good faith claim in excess of $50,000, had misrepresented its corporate citizenship and was non-diverse to Defendant-Petitioner at the commencement of the action. (App. E at A-27 to A-30, App. G at A-40, and App. I at A-97). Plaintiff-Respondent-Interkal, Inc. not only asserted, in conclusory fashion, a contract claim having an alleged value in amount in controversy in excess of $50,000, but also jurisdiction supplemental to the diversity jurisdiction asserted by Sumitomo pursuant to 28 U.S.C. § 1367(a) (App. G, at A39-A52). Upon the discovery that Sumitomo had misrepresented its corporate citizenship and was not diverse as to Defendant-Petitioner, the question whether the value of Interkal's contract claim exceeded the jurisdictional minimum of $50,000 arose: Interkal no longer could rely on supplemental jurisdiction and had to prove grounds independent of the jurisdiction claimed by Sumitomo to maintain its action in a federal forum. *KVOS, Inc. v. Associated Press*, 299 U.S. 269, 277-278, 57 S.Ct. 197, 81 L.Ed. 183 (1936). Further, immediately upon discovery that incomplete diversity of citizenship existed among the parties,

counsel for Defendant-Petitioner suggested on the record that a genuine question existed whether Interkal ever had a claim capable of exceeding $50,000 in damages because governing, substantive law limited Interkal's maximum potential contract recovery to less than $50,000. (App. E at A-28 through A-30). At trial, and in response to Defendant-Petitioner's Rule 52(c) motion, the district court applied the governing, substantive law referenced by counsel for Defendant-Petitioner and held that an element of loss claimed by Interkal -- alleged increases in insurance premiums -- were not recoverable because they "were not within the contemplation of the parties' agreement in fact as expressed in the 1981 asset purchase agreement..." (App. F at A-37 and A-38). The district court's conclusion was not reversed on appeal. (App. 1 at A-6).

St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 288-289, 58 S.Ct. 586, 82 L.Ed. 845 (1938) holds that if from the facts disclosed at trial "it is clear that his claim never could have amounted to the sum necessary to give jurisdiction, there is no injustice in dismissing the suit." *Id.* Here, the facts disclosed at trial established, as a matter of law, that recovery of the alleged "increased insurance premiums" never was "contemplated" by the terms of the 1981 asset purchase agreement, a copy of which was appended to the complaint. Contrary to Interkal's contention, the law gave a "different rule" which limited the value of Interkal's claim to less than the jurisdictional minimum. The district court was satisfied "to a legal certainty" that the value of the amount in controversy as to Interkal's claim was less than the jurisdictional minimum specified by 28 U.S. C. § 1332(a).

In addition, this court's decision in *Horton v. Liberty Mutual Insurance Co.*, 367 U.S. 348, 353, 81 S.Ct. 1570, 6

L.Ed.2d 890 (1961) suggests that the "legal certainty" and "good faith" standards referenced in *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 288-289, 58 S.Ct. 586, 82 L.Ed. 845 (1938) are variant expressions of the same test. Here, the facts of this case render this case an appropriate vehicle for holding that extreme speculation in asserting a potential recovery in excess of the minimum jurisdictional amount, contrary to a governing common law remedial rule, constitutes a "bad faith" assertion for jurisdictional purposes.

CONCLUSION

For the reasons asserted, Defendant-Petitioner respectfully requests that this petition be granted and a writ of certiorari issue to the court of appeals below.

Dated at Milwaukee, Wisconsin this 2nd day of March, 1998.

/s/_____
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Counsel of Record
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APPENDIX

APPENDIX A

No. 96-2183

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
December 3,1997
LEONARD GREEN, CLERK

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

INTERKAL, INC.; SUMITOMO MARINE & FIRE INSURANCE CO. (JAPAN), LTD.,	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN
Plaintiffs-Appellees,	)	
v.	)	
UIS, INCORPORATED,	)	
Defendant-Appellant.	)	

Before, NELSON, BOGGS and COLE, Circuit Judges.

Interkal, Inc., et al. v. UIS, Inc.
No. 96-2183

PER CURIAM. This case involves a contract dispute over whether an indemnification clause covers sums paid in settlement of several state products liability actions. The appellant also raises a challenge to the district court's subject matter jurisdiction. For the reasons that follow, we affirm the district court.

I. FACTS AND PROCEEDINGS BELOW

Prior to December 31, 1980, Interkal, Inc. ("old Interkal"), a Michigan corporation, was engaged in the business of manufacturing and selling bleachers. At that time old Interkal was a wholly owned subsidiary of the appellant, UIS, Inc. ("UIS" or "appellant"). In early 1981, a holding company was incorporated for the purpose of purchasing certain assets from old Interkal. Following the incorporation of the holding company, UIS and the holding company executed an asset purchase agreement for the sale of certain assets from old Interkal to the holding company. Upon closing, the holding company changed its name to Interkal, Inc. "Interkal" or "appellee") and old Interkal changed its name and was later dissolved. Paragraph 22 of the asset purchase agreement addressed the liability of old Interkal and UIS.

> 22. SELLER's Indemnity. SELLER and UIS agree to jointly and severally indemnify PURCHASER against, and hold it harmless from . . . (iv) all damages, claims, losses, expenses, costs, judgments, liabilities and obligations incurred by PURCHASER arising out of: (a) any product liability (personal

> injury or property damage) claim being made against PURCHASER arising out of or relating to any product sold or shipped by SELLER prior to December 31, 1980, whether such claim is based upon the direct liability of PURCHASER or PURCHASER'S liability as a successor of SELLER; and (b) any claim against PURCHASER for indemnification or reimbursement by any third person arising out of SELLER'S contractual liability for products liability claims regarding products sold by persons other than SELLER prior to December 31, 1980; and (v) all reasonable attorneys' fees and disbursements and court costs incurred by PURCHASER arising out of the foregoing.

In 1988 a bleacher manufactured, sold and shipped by old Interkal to a Maryland high school collapsed. A number of students filed suit in Maryland state court against Interkal alleging breaches of express and implied warranties, strict liability in tort and general negligence with respect to the design, manufacture and sale of a defective product. UIS was substituted for Interkal. In 1992, UIS settled a few of the cases on behalf of itself and Interkal without contribution from Interkal. The remaining plaintiffs amended their complaints adding Interkal as a defendant, alleging that Interkal had a duty to warn, recall and/or notify purchasers of the availability of a retrofit kit. Interkal requested that UIS defend and indemnify it in each of the actions in which it was added as an additional defendant. UIS refused. Interkal referred the suits to its insurer's agent, Sumitomo Marine Management (U.S.A.), Inc. ("Sumitomo"), which retained

counsel to defend the suits. In early 1993, UIS settled with a few more plaintiffs on behalf of itself and Interkal without contribution from Interkal. The remaining plaintiffs then again amended their complaints, adding claims for punitive damages against both UIS and Interkal.

Shortly before trial, UIS's attorney informed Interkal's attorney that UIS would not settle and was preparing for trial. Interkal's counsel informed UIS's attorney that he was engaged in settlement discussions with the remaining plaintiffs and that he intended to negotiate a settlement on behalf of Interkal in the range of $300,000. The Interkal attorney asked if UIS was inclined to settle and was told that UIS was not so inclined. The Interkal attorney continued settlement talks. Three days before trial, Interkal settled fifteen of the cases for $300,000 and one for $7500.

In 1994, Interkal and Sumitomo initiated this action against UIS to recover monies they contended were owed by UIS in indemnification. Sumitomo was later dropped from the suit to preserve diversity of the parties. The district court granted plaintiff-appellee Interkal partial summary judgment, ruling that the indemnification provision of the asset purchase agreement was clear and unambiguous and required UIS to indemnify Interkal in the underlying Maryland cases. The court later conducted a bench trial on the issue of damages under the indemnification clause in the asset purchase agreement. It also later granted UIS's Fed. R. Civ. P. 52(c) motion, ruling that the plaintiff's claim for damages for increased insurance premiums was not covered by the indemnification provision of the parties' contract.

Appellant UIS now appeals to this court, arguing that UIS is not obligated under the asset purchase agreement to indemnify Interkal for its settlement of the underlying Maryland products liability suits. In addition, UIS contends that in order to recover sums in indemnification, the district court should have required Interkal to demonstrate its actual, as opposed to its potential, liability in the Maryland suits. UIS additionally contends that the district court never had proper diversity jurisdiction because Interkal did not satisfy the amount in controversy requirement of 28 U.S.C. § 1332.

II. DISCUSSION

A. The Amount-in-Controversy Requirement

The appellant contends that Interkal did not satisfy the amount-in-controversy requirement of 28 U.S.C. § 1332 so that the district court never properly had diversity jurisdiction. The existence of subject matter jurisdiction is a question of law subject to our *de novo* review. *Gafford v. General Electric Co.*, 997 F.2d 150, 155 (6th Cir. 1993). At the same time, we review a district court's factual determinations regarding jurisdictional issues for clear error. *Id.* The amount in controversy alleged in a complaint will suffice unless it appears to a legal certainty that the plaintiff cannot claim the jurisdictional amount in good faith. *Jones v. Knox Exploration Corp.*, 2 F.3d 181,182 (6th Cir. 1993) (citing *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283,289, 58 S. Ct. 586, 82 L. Ed. 845 (1938)); *Klepper v. First Am. Bank*, 916 F.2d 337, 340 (6th Cir. 1990).

A federal district court has original jurisdiction over

diversity cases only "where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs." 28 U.S.C. § 1332(a) (1996). The only basis for federal court jurisdiction in this case is diversity of citizenship.

The appellant argues that the appellee's claim for damages for increased insurance premiums were not recoverable as a matter of Michigan law and therefore could not be used in determining if the jurisdictional amount was satisfied, making the complaint insufficient on its face in terms of satisfying the minimum amount-in-controversy. The appellant bases its contention that the appellee's claim for damages for increased insurance premiums is prohibited as a matter of Michigan law on the established rule that breach of contract damages are recoverable only for those damages that either arise naturally from the breach or that were contemplated by the parties at the time the contract was made. *See Kewin v. Mass. Mutual Life Ins. Co.*, 295 N.W.2d 50, 52-53 (Mich. 1980). The appellant reasons that damages for increased insurance premiums were not contemplated by the parties as evidenced by their absence from the explicit terms of the asset purchase agreement, and were thus prohibited as a matter of Michigan law, making the amount sought in damages ineligible for satisfying § 1332. This argument fails. The damages are not prohibited as a matter of law *per se*. Rather, the issue is one of contract interpretation. As the issue is a matter of contract interpretation, it is not apparent "to a legal certainty" that the appellee could never recover damages for increased insurance premiums. *See Knox Exploration Corp.*, 2 F.3d at 182. "IT]he legal impossibility of recovery must be so certain as virtually to negative the plaintiff's good faith in asserting the claim. If the right of recovery is

uncertain, the doubt should be resolved . . . in favor of the subjective good faith of the plaintiff." *Tongkook America, Inc. v. Shipton Sportswear Co.*, 14 F.3d 781,785 (2d Cir. 1994) (quoting *McDonald v. Patton*, 240 F.2d 424, 426 (4th Cir. 1957)). The fact that the appellee's claim for increased premiums was eventually found to have insufficient evidentiary support is irrelevant to its role in satisfying the amount-in-controversy requirement. *See Klepper*, 916 F.2d at 341. Accordingly, we find that the district court properly had jurisdiction of this case.

B. The Indemnification Clause

The appellant contends that the district court erred in granting the appellee summary judgment on the basis that the contract's indemnification clause was unambiguous and that the appellee was indemnified under the plain language of the contract for sums paid in settlement of the underlying suits. We review an order granting summary judgment *de novo*, using the same standards as the district court. *Peoples Bank & Trust Co. of Madison Co. v. Aetna Cas. & Surety Co.*, 113 F.3d 629, 633 (6th Cir. 1997). We review matters of contract interpretation *de novo* and any factual findings for clear error. *Boyer v. Douglas Components Corp.*, 986 F.2d 999, 1003 (6th Cir. 1993).

The appellant argues that the district court erred in granting the appellee summary judgment because the district court should have considered extrinsic evidence demonstrating that the parties did not intend for Interkal to be indemnified for its own independent negligence after the sale. The appellant recites the rules regarding the permissibility of

considering extrinsic evidence under Michigan's parol evidence rule, and then states that the evidence in this case leads to the conclusion that Interkal should not be indemnified for its settlement of the Maryland suits. However, the appellant never suggests that the contract's terms are ambiguous or that the extrinsic evidence produces an ambiguity, alternative prerequisites to examining extrinsic evidence in the construction of a contract. *See, e.g., McCarty v. Mercury Metalcraft Co.*, 372 Mich. 567, *575* (1964); *Mich. Millers Mutual Ins. Co. v. Bronson Plating Co.*, 496 N.W.2d 373,379 (Mich. Ct. App. 1992).

UIS also argues that the underlying state suits are negligence actions and the contract does not expressly state that it includes coverage of negligence actions. UIS contends that the indemnification of "product liability claims" under the contract does not necessarily include negligence actions. It argues that the underlying suits are negligence claims, and not product liability claims.

The question of whether the language of a written agreement is ambiguous is one of law. *Parrett v. Am. Ship Building Co.*, 990 F.2d 854, 858 (6th Cir. 1993). When the plain language of a contract can be reasonably construed in only one manner, the contract is not ambiguous. *See, e.g., Raska v. Farm Bureau Mutual Ins. Co. of Mich.*, 314 N.W.2d 440, 441 (Mich. 1982); *Allstate Ins. Co. v. Goldwater*, 415 N.W.2d 2, 4 (Mich. Ct. App. 1987). The language of the indemnification clause in dispute requires UIS to indemnify Interkal and hold it harmless from:

> (iv) all damages, claims, losses, expenses, costs, judgments, liabilities and obligations incurred by PURCHASER arising out of: (a) any product liability (personal injury or property damage) claim being made against PURCHASER arising out of or relating to any product sold or shipped by SELLER prior to December 31, 1980, whether such claim is based upon the direct liability of PURCHASER or PURCHASER'S liability as a successor of SELLER;

¶ 22, Asset Purchase Agreement, J.A. 52 (emphasis added). The provision provides coverage for any product liability claim against "new Interkal" arising out of bleachers sold and shipped prior to December 31, 1980, regardless of whether the claims are asserted against new Interkal or as a successor in interest to old Interkal. The provision and the term "product liability claim" are unambiguous. Product liability claims include negligence actions. *See* W. Page Keeton, *et al., Prosser and Keeton on the Law of Torts,* §§ *95,* 96, 99 (5th ed. 1984).

As the indemnification provision is not ambiguous, extrinsic evidence was not needed to ascertain its meaning or the parties' intent, and the plain meaning of the indemnification provision includes the underlying Maryland suits, the appellant's arguments regarding this issue fail.

C. Demonstration of Potential Liability

The appellant also contends that the district court erred

in concluding that Interkal was required to demonstrate only potential liability, rather than actual liability, in the underlying suits in order to be indemnified for sums paid in settlement of the underlying suits. We review *de novo* the question of the appropriate legal standard. *Chatman v. Slagle*, 107 F.3d 380, 384 (6th Cir. 1997); *In re Carled, Inc.*, 91 F.3d 811,813 (6th Cir. 1996).

Under Michigan law, only potential liability is required to be demonstrated by those indemnitees who seasonably tender a defense, provide notice that a settlement would be entered into prior to settling a claim, and show that the indemnitor refused the tender of the defense. *Pritts v. J.I. Case Co.*, 310 N.W.2d 261, 266 (Mich. Ct. App. 1981); *see also Proctor & Schwartz, Inc. v. U.S. Equip. Co.*, 624 F.2d 771, 776 (6th Cir. 1980) (noting same rule of Michigan law); *Consol. Rail Corp. v. Ford Motor Co.*, 751 F. Supp. 674,676 (E.D. Mich. 1990) (same). The appellant's only basis for its contention is that the appellee did not communicate all of the terms of the proposed settlement. The argument fails as the appellee was only required to give notice of the intent to settle. The appellee did communicate notice to the appellant as well as its acceptable parameters for a settlement figure. to this issue. Accordingly, we affirm the district court as to this issue.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FILED
July 30, 1996

INTERKAL, INC., a Michigan corporation, *Plaintiff*,	)	Case No. 4:94-CV-82
v.	)	HON. DAVID W. McKEAGUE
UIS, INC., a New York corporation, *Defendant*.	)	**JUDGMENT ORDER**

/

For the reasons stated more fully in the Court's bench ruling of even date,

IT IS HEREBY ORDERED that **JUDGMENT** is entered for plaintiff on its claim for attorneys' fees and expenses in the amount of $16,101.32.

IT IS FURTHER ORDERED that **JUDGMENT** is entered for plaintiff on its claim for $3,903.75 in expenses relating to the construction of a demonstration bleacher.

IT IS FURTHER ORDERED that JUDGMENT is entered for plaintiff on the claim asserted on behalf of Sumitomo Marine & Fire for the $307,500 paid in settlement to the plaintiffs in the underlying Maryland litigation.

IT IS FURTHER ORDERED that **JUDGMENT** is entered for plaintiff on the claim asserted on behalf of Sumitomo Marine & Fire for attorneys' fees in the amount of $71,672.33.

IT IS FURTHER ORDERED that defendant's Rule 52(c) motion is **GRANTED** with respect to plaintiff's claim for recovery of alleged increases in insurance premiums.

Dated: July 29, 1996

/S/_____
DAVID W. McKEAGUE
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

INTERKAL, INC., and	)	
	)	Case No. 4:94-CV-82
SUMITOMO MARINE	)	
MANAGEMENT (U.S.A.),	)	HON. DAVID W.
INC.,	)	McKEAGUE
Plaintiffs,	)	
	)	**MEMORANDUM**
v.	)	**OPINION**
	)	
UIS, INC.,	)	
Defendant.	)	
_____/		

Presently before the Court are two motions: (1) plaintiffs' joint motion to substitute Sumitomo Marine & Fire Insurance Co. (Japan), Ltd. ("Marine & Fire") for Sumitomo Marine Management (U.S.A.), Inc. ("Marine Management") as a party plaintiff or, in the alternative, plaintiffs' joint motion to drop Marine Management as a named party to this action; and (2) defendant's motion to dismiss the complaint of Marine Management. For the reasons discussed below, Marine Management is dropped as a party plaintiff, and defendant's motion to dismiss Marine Management's complaint is **denied as moot**.

Interkal, Inc., et al. v. UIS, Inc.
No. 4:94-CV-82

I. MOTION TO SUBSTITUTE OR DROP A PARTY

Plaintiffs' joint motion, filed pursuant to Fed. R. Civ. P. 17(a),[1] requests the Court to substitute Marine & Fire for Marine Management as a party plaintiff in this case. In the alternative, plaintiffs request the Court to drop Marine Management as a named party to this action pursuant to Fed. R. Civ. P. 21.

Because Marine Management is a New York Corporation, and the continued presence of Marine Management in this action destroys complete diversity, the Court is without jurisdiction to determine the merits of plaintiffs' motion for substitution. A finding that this Court lacks jurisdiction over Marine Management's claims, however, does not require dismissal for it is "well settled that [Fed.] Rule [Civ. P.] 21 invests district courts with authority to allow a dispensable nondiverse party to be dropped at any time ...." Newman-Green, Inc. v. Alfonzo-Larrain, 109 S.Ct. 2218, 2223 (1989). Fed. R. Civ. P. 19(b) sets forth the factors to be considered by a court in determining whether to allow an action to proceed in the absence of an interested

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[1] Fed. R. Civ. P. 17(a) provides:

> No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

party. Martin v. Wilks, 490 U.S. 755, 764 (1989). The Court must consider four factors:

> [F]irst, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed ....

Fed. R. Civ. P. 19(b). If application of these four factors suggests that the case should not proceed in the absence of a party, that party is considered indispensable and the case should be dismissed. Id. If, instead, application of these factors leads the Court to the conclusion that the case should proceed ,in the absence of that party, the party is dispensable.

Applying these factors to this case, the Court determines that Marine Management is not an indispensable party. See United States v. Aetna Casualty & Surety Co., 338 U.S. 366, 382 (1949) (where an insurer has become partially subrogated to the rights of an insured, both are necessary but not indispensable parties). While proceeding in this matter without Marine Management may subject UIS to an additional suit in state court, a subsequent suit by Marine Management is unlikely inasmuch as Marine Management now claims that it does not claim any right, title or interest to any money paid out in the underlying Maryland litigation or in any attorney's fees expended in that litigation. Thus, a judgment in the

absence of Marine Management will not prejudice Marine Management or any of the other parties. In addition, the Court can resolve the matters in controversy between Interkal and UIS, even in the absence of Marine Management. If the entire suit were dismissed, Interkal would simply refile against UIS and submit the discovery matters already in hand. As the Supreme Court has noted in a similar situation, parties "should not be compelled to jump through these hoops merely for the sake of hypertechnical jurisdictional purity." Newman-Green, Inc., 109 S.Ct. at 2225.

Defendant does not argue that Marine Management is an indispensable party. Instead, defendant contends that even if Marine Management is dropped as a party plaintiff, the Court must dismiss the case for lack of subject matter jurisdiction because Interkal, although diverse, cannot satisfy the requisite amount in controversy. The Court, however, disagrees.

In the complaint, Interkal alleged that the amount in controversy was in excess of $50,000. "The rule governing dismissal for want of jurisdiction in federal court is that, unless the law gives a different rule, the sum claimed by the plaintiff controls, if the claim is apparently made in good faith." St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 288 (1938). "[U]nless it appears 'to a legal certainty that the claim is for less than the jurisdictional amount[,]'" the amount stated in the complaint controls. Jones v. Knox Exploration Corp., 2 F.2d 181, 182 (6th Cir. 1993) (citing Red Cab, 303 U.S. at 289).

Defendant does not contend that plaintiff Interkal

failed to make a good faith claim of sufficient amount. Instead, defendant contends that Interkal is unlikely to succeed on one aspect of its claim, and thus to recover less than the required amount in controversy. Essentially, defendant now asks the Court to make a determination of how much Interkal is entitled to recover, and if that amount totals less than $50,000, to dismiss the case for lack of subject matter jurisdiction. This position is not supported by the case law.

Even if the Court were to rule that Interkal is not entitled to prevail on one aspect of its claim for damages arising out of UIS's breach of contract as a matter of law, this decision would not counsel dismissal; once a good-faith claim of the requisite amount has been made in the complaint, "subsequent events that reduce the amount below the statutory requirement do not require dismissal." Jones, 2 F.2d at 182-83.[2] Interkal's complaint asserted a claim for declaratory relief and a claim for breach of contract. The request for declaratory relief asked the Court to enter an order that defendant UIS was obligated under the terms of the Asset Purchase Agreement "to indemnify and defend Interkal with

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[2] For example, in Klepper v. First American Bank, 916 F.2d 337 (6th Cir.1990), the complaint alleged claims for compensatory, punitive and incidental damages. After dismissing the claims for punitive and compensatory damages on a partial summary judgment motion, the district court dismissed the entire action because the remaining claim did not satisfy the requisite amount in controversy. On appeal, the Sixth Circuit reversed, holding that dismissal of the two claims did not deprive the district court of jurisdiction because the three claims alleged in the complaint satisfied the required jurisdictional amount.

respect to any other present or future claims arising out of or relating to bleachers manufactured[,] sold and shipped...on or before December 31, 1980." Complaint, at ¶ 31. At the onset of this case, the aggregate amount in controversy of these two claims was more than $50,000, and satisfied the amount in controversy requirement. While the Court later denied Interkal the declaratory relief requested,[3] this in no way changes the fact that a good faith claim of the requisite amount was made in the complaint. Klepper, 916 F.2d at 341.

Accordingly, Marine Management shall be dropped as a party-plaintiff pursuant to Fed. R. Civ. P. 21. This case will proceed to trial in the **July 1996** trial term. A final pretrial conference shall be conducted on **June 17, 1996**, at 11:00 a.m. The Court has already determined that defendant UIS is liable to Interkal for breach of contract, and the scope of trial shall be limited to the issue of damages arising out of this breach of contract as asserted by Interkal in the complaint unless (1) Interkal files a motion to amend their complaint to assert the claims of Marine & Fire that were previously asserted by Marine Management; or (2) Marine & Fire moves to joint or intervene into this action **not later than April 11, 1996.**

II. MOTION TO DISMISS

Defendant UIS requests the Court to enter an order dismissing the complaint of Marine Management with prejudice for its failure to comply with the Court's order

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[3] See Order dated May 10, 1995.

directing Marine Management to provide supplemental responses to certain interrogatories and requests for production of documents pursuant to Fed. R. Civ. P. 37(b) (2) (C). In the alternative, defendant UIS requests that the Court preclude Marine Management from asserting that it is not the real party in interest. The Court, in connection with plaintiffs' joint motion to drop Marine Management as a party plaintiff, dropped Marine Management as a party plaintiff.

Accordingly, defendant's motion to dismiss Marine Management's complaint pursuant to Fed. R. Civ. P. 37(b) (2) (C) is **denied as moot**. Similarly, defendant's alternate motion to preclude Marine Management from asserting that it is not the real party in interest is **denied as moot**.

An order consistent with this opinion shall issue forthwith.

/s/_____
DAVID W. McKEAGUE
UNITED STATES DISTRICT JUDGE

Dated: March 29, 1996

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FILED
April 1, 1996

INTERKAL, INC., and	)	
	)	Case No. 4:94-CV-82
SUMITOMO MARINE	)	
MANAGEMENT (U.S.A.),	)	HON. DAVID W.
INC.,	)	McKEAGUE
Plaintiffs,	)	
	)	**ORDER**
v.	)	
	)	
UIS, INC.,	)	
Defendant.	)	

_____/

For the reasons discussed more fully in the Court's memorandum opinion of even date,

IT IS HEREBY ORDERED that plaintiffs' motion to drop Sumitomo Marine Management (U.S.A.), Inc. as a party plaintiff (docket #53) is **GRANTED.**

IT IS FURTHER ORDERED that this case will proceed to trial in the **July 1996** trial term. A final pretrial conference shall be conducted on **June 17, 1996**, at

Interkal, Inc., et al. v. UIS, Inc.
No. 4:94-CV-82

11:00 a.m. The Court having previously determined that defendant UIS, Inc. is liable to Interkal, Inc. for breach of contract, the scope of trial shall be limited to the issue of damages arising out of this breach of contract as asserted by Interkal, Inc. in the complaint unless (1) Interkal, Inc. files a motion to amend their complaint to assert the claims of Sumitomo Marine & Fire Insurance Co. (Japan), Ltd. that were previously asserted by Sumitomo Marine Management (U.S.A.), Inc.; or (2) Sumitomo Marine & Fire Insurance Co. (Japan), Ltd. moves to join or intervene into this action **not later than April 11, 1996**.

IT IS FURTHER ORDERED that defendant's motion to dismiss (docket #70) is **DENIED AS MOOT**.

IT IS SO ORDERED.

/s/_____
DAVID W. McKEAGUE
UNITED STATES DISTRICT JUDGE

Dated: March 29, 1996

APPENDIX E

TRANSCRIPT OF TRIAL PROCEEDINGS ON 8/8/95

Lansing, Michigan
August 8, 1995, 8:40 A.M.
(Call to order of the court.)

THE COURT: You may be seated. This is the matter of Interkal, Inc., and Sumitomo Marine versus UIS, Inc., case 4:94-CV-82.

* * *

Mr. Ritter, do you wish to begin by making an opening statement?

MR. RITTER: Yes, sir.

MR. HANNAN: Your Honor, may I be heard for one moment on a matter that surfaced as a result of an evidentiary deposition that was taken on Saturday, August 5?

THE COURT: Go ahead.

MR. HANNAN: It goes to a potential subject matter Jurisdiction issue that I think the court needs to be aware of. The company that -- we've discovered as of August 5 that the company that's issued the policy to Interkal is Sumitomo Marine and Fire Insurance Company, Limited, of Japan. The pleadings in this case have been captioned or styled in the name of Sumitomo Marine Management (U.S.A.), Inc.

It is a subrogee of Interkal. It is confirmed that as of August 5 by an evidentiary deposition that was conducted by Mr. DeCaro and myself of the claims administrator for Sumitomo Marine Management that that company has not issued a policy to Interkal and it has no contract, it has no obligation. If the policy was issued by a Japanese company, not this company, I'd submit, and I'm looking into the question now, Your Honor, that Sumitomo Marine Management, Inc., is not the real party plaintiff and I respectfully submit that there may be a Jurisdictional question under 28 USC 1332 on the theory that if this plaintiff had no legal obligation to this putative insured at the time of filing of the complaint, there was no damage in excess of $50,000.

I am looking at that issue right now and I have not resolved the question, but these issues have arisen as of August 5 of 1995 at the evidentiary deposition that was taken in Greenbelt, Maryland, for use at trial, and I respectfully submit, Your Honor, that Sumitomo Marine Management is not the real party plaintiff, was never the real party plaintiff at the time of the commencement of this action, and that there may well be a defect in the subject matter Jurisdiction of this court.

THE COURT: When did you obtain a copy of the contract of insurance between Sumitomo and Interkal?

MR. HANNAN: That was delivered to my office on or about July 21 of 1995. It was not confirmed until I had a chance to depose Ms. Lowden at the evidentiary deposition that was conducted in Greenbelt, Maryland, on August 5 of 1995,

* * *

MR. HANNAN: So we have -- this action has never been commenced by a real party plaintiff having a real party -- having an interest in this litigation, and I respectfully submit at this point, Your Honor, there may well be a 12(b)(1) Jurisdictional defect. I'm looking into that question now and I'm raising that at this point because it is an open issue which has not yet been resolved.

* * *

MR. RITTER: We believe we do, yes.

THE COURT: You may proceed.

MR. RITTER: Your Honor, we're here today to deal with damages. The court has already ruled on liability issues in this case and has found that indeed the defendant, UIS, Inc., has an obligation to indemnify the new Interkal with respect to the Maryland bleacher collapse cases as previously decided.

Basically, today Interkal, my client, is here asking for three different categories of damages. First, we are asking to recover attorneys' fees and costs expended by my firm, and I'm pleased to tell the court that as to reasonableness and necessity we have agreed with the defense on the amount of $16,101.52. They do not agree that they are liable or obligated as a matter of law to pay those, but there is a stipulation as to the amount and as to reasonableness and necessity.

Likewise, with respect to our second category of damage, which is a request for reimbursement for constructing a demonstration bleacher to be used in the Maryland trial, we have agreed that as to reasonableness and necessity the amount there is $3,903.75.

The remaining item is the premium loss that we are seeking to recover as a result of the breach of the indemnification agreement by UIS, Inc., and that amount is approximately $60,000.00.

With respect to UIS, just to cut to the chase, UIS has two items of damage. The first item is reimbursement for the settlement amount they paid in the Maryland case, and that totals $307,500.00, and secondly is the amount of attorneys' fees and costs which Sumitomo paid Mr. DeCaro and expert witnesses, et cetera. That amount is $71,672.33.

THE COURT: What was that number again?

MR. RITTER: $71,672.33.

THE COURT: Is there any stipulation as to the amount, reasonableness, and necessity of that figure, the 71,000, as there is with respect to the 16,000?

MR. RITTER: No, sir.

* * *

THE COURT: Very well. Mr. Hannan, do you wish to make your opening statement now or reserve?

MR. HANNAN: I will make it now, If the court please.

THE COURT: You may.

MR. HANNAN: May it please the court, on behalf of UIS it is the position of UIS that the amounts at issue in this case will not be recoverable on either of two alternative theories. Number one -- or three alternative theories at this point. Number one, we will establish to the court that Sumitomo Marine Management, Inc., is not the real party plaintiff. Indeed, the record will establish that the policy in this case was issued by Sumitomo Fire and Marine Insurance Company, Limited, of Tokyo. We will further establish through the testimony of Cheryl Lowden that the payments made on behalf of Interkal were made by Sumitomo Fire and Marine Insurance Company, Limited, and not by Sumitomo Marine Management. The plaintiff in this case --

THE COURT: Let me ask you this question, Mr. Hannan, and obviously the court has considerably more flexibility to inject itself and ask questions as we proceed here inasmuch as this is a bench trial. Is the contract statute of limitations still open with respect to claims that could be made by what you contend is the real party in interest here?

MR. HANNAN: I have not analyzed that question at this time, Your Honor.

THE COURT: Does not the contract say that it's governed by Michigan law?

MR. HANNAN: Assuming the Michigan statute of limitations on contract issues would apply, it is what it is. Six years -- six years from the date of payment certainly has not yet run. That's correct.

THE COURT: So as fun as this may be to all of you lawyers, what difference does it make if you proceed ahead with whichever Sumitomo it is here or, even if you succeed in this, Mr. Ritter and Mr. DeCaro turn around tomorrow, they file a new lawsuit in the name of the correct Sumitomo? Are you somehow prejudiced? Is there something I'm missing in this dispute?

MR. HANNAN: Your Honor, I respectfully submit the proper analysis here has nothing to do with prejudice. It has to do with whether or not this court acquired subject matter jurisdiction under 28 USC 1332.

* * *

MR. HANNAN: All right. My position, Your Honor, in this regard is that the complaint in this case asserted that Sumitomo Marine Management was a New Jersey corporation and that it is the company that provided a policy of general liability insurance to Interkal. My position, and I'll just say this for the record, pursuant to Rule 12(b)(1) we move to dismiss for lack of federal subject matter Jurisdiction on the following grounds: At the time this pleading was filed the only Jurisdictional basis invoked -- to invoke the power of the federal Judiciary, which are courts of limited jurisdiction, was 28 USC 1332. If the party filing the complaint at the time of the filing of the complaint had no interest in the case, it could

not have been damaged. It is for this reason that we would agree that there has been -- Sumitomo is a carrier, et cetera, but the question here as we see it is did this court properly acquire subject matter jurisdiction of the action when the party filing the complaint did not have an interest in the claim and could not have sustained damage in fact.

THE COURT: I understand that the court may or may not have jurisdiction over Sumitomo, which you started out about 15 minutes ago saying that you were researching and still inquiring into and now 16 minutes later you are trying to convert your opening statement into a 12(b)(1) motion. Assuming that all that's true, is there not complete diversity between Interkal and UIS?

MR. HANNAN: That's correct.

THE COURT: Have they not asserted a claim that exceeds $50,000? They've got $60,000 in prospective insurance premiums that they may or may not be liable for in and of themselves.

MR. HANNAN: We would assert there, Your Honor, that the compensatory damages, the net of the premiums, are less than the jurisdictional limit and the premium issue is a question of law for the court under Hadley against Baxendale. If that is not recoverable as a matter of law, we have less than the $50,000 jurisdictional question.

THE COURT: Do you understand dispositive motions?

MR. HANNAN: I understand that, Your Honor.

THE COURT: Do you understand motions in limine?

MR. HANNAN: Yes, I do, Your Honor.

THE COURT: Was there a motion filed in this case with respect to either of those issues?

MR. HANNAN: But this issue just arose as a result of the discovery on Saturday, Your Honor. That's what I'm saying. It was not appreciated until Saturday.

THE COURT: This issue of whether Sumitomo is the correct party in interest doesn't have anything to do with whether Interkal itself exceeds the amount in controversy by virtue of the insurance premiums which has been a claim in this case from day one. Now, the question is does this court not have subject matter jurisdiction of at least some part of this claim by virtue of the claims by Interkal whether Sumitomo is properly a plaintiff or not?

MR. HANNAN: I submit -- I submit, Your Honor, at this point there is an open issue for this reason. The basis claimed at the time of the filing of the pleadings on behalf of Interkal was ancillary, ancillary jurisdiction, and if, as I understand the rule --

THE COURT: What was ancillary jurisdiction?

MR. HANNAN: Interkal. As I understand Interkal's pleadings, they have asserted ancillary jurisdiction, ancillary

to any federal subject matter jurisdiction that this court would have acquired relative to Sumitomo, and all I'm saying at this point, Your Honor, is that if an essential ingredient of Interkal's claim is not recoverable at law under Hadley against Baxendale and absent that element the jurisdictional amount would be less than $50,000, then indeed this court has a difficulty.

THE COURT: You must be reading a different complaint than I am.

MR. HANNAN: The complaint by Sumitomo is directly under 20 USC 1332. As I understood the pleading as respects Interkal --

THE COURT: The question that you and I have been discussing for the last several minutes is the claim between Interkal and UIS, not Sumitomo and UIS.

MR. HANNAN: Correct, Your Honor.

THE COURT: This is a declaratory judgment action by Interkal under 28 USC section 2201.

MR. HANNAN: And the declaratory judgment statute, as I understand it, does not provide an independent basis for jurisdiction but rather jurisdiction must be predicated on one of the independent grounds under 28 USC 1331, either general question, or 28 USC 1332, diversity.

THE COURT: Look at paragraph 8.

MR. HANNAN: All right.

MR. MCCLEAR: That's number one.

THE COURT: You've correctly summarized the second sentence in paragraph 8 of the complaint, and I would submit you conveniently overlooked the first one -- first sentence.

MR. HANNAN: The complaint does assert complete diversity of citizenship and an amount in excess of $50,000 per party.

THE COURT: So not having filed a motion to dismiss, why does this court not have subject jurisdiction in this case with respect to the claims between Interkal and UIS regardless
of whether Sumitomo is or is not the real party in interest, which you say they're not and Mr. Ritter says there is and I haven't heard any proofs?

MR. HANNAN: My position in that regard, Your Honor, is as stated earlier.

THE COURT: Well, that position was wrong, so do you want to try another position?

MR. HANNAN: Well, I've just made my record, Judge. I'll move on --

* * *

MR. HANNAN: Judge, I am prepared to defend

whatever it is that they're putting forward on the merits. I'm just simply alerting the court that based on information that first came to my attention on August 5 that I have become aware of facts which were not disclosed previously which I respectfully suggest raise a question of the power of this court, and what I am doing based on the fact that I understand that courts -- federal courts have an obligation to inquire into their subject matter jurisdiction at all stages of the proceedings, I'm simply alerting the court to information that I have become aware of as of Saturday which I suggest raise a question of power, and it is for this court to decide.

THE COURT: Are you withdrawing your 12(b)(1) motion? You'll have the right to -- I agree with your assessment of the law in that regard, subject matter Jurisdiction is an issue that is preserved, as I understand it, through an appeal.

MR. HANNAN: Correct.

THE COURT: Now, I thought I heard you say you moved to dismiss under 12(b)(1), and if you did, I suppose I have to deal with that, although I would suggest to you that given the timing of your motion will undoubtedly take it under advisement in any event. So do you want to go ahead on that or not?

MR. HANNAN: I would suggest take it under advisement or whatever, Your Honor. All I was doing in that regard was responding to the court's question that the court -- I wanted -- what I am attempting to do here, Your Honor, is to focus the court's attention on facts that I have just

become aware of.

THE COURT: All right. I appreciate that.

MR. HANNAN: As to the legal meaning of those facts it is for the court to decide.

THE COURT: Now, in the event that the plaintiff has pled the incorrect Sumitomo company, and I'm assuming implicit in my question that these Sumitomo insurance companies are all interrelated in some way, but assuming for purposes of my question that we've got the wrong parent or the wrong subsidiary or whoever it may be, do you object to an amendment of the pleadings right now to whatever it is is this correct Sumitomo company?

MR. HANNAN: We will not claim surprise or prejudice. We do not -- I don't have a motion before me to amend the pleadings, but we are not contending that there would be surprise or prejudice if that were to be done. The question is does the court have the power to do that under the pleadings as currently cast.

THE COURT: What do you perceive to be the limitations on this court's power to amend the pleadings to conform to the proofs if that be the appropriate course of action?

MR. HANNAN: If for whatever reason this court did not acquire subject matter Jurisdiction at the time of the initial filing, then -- if for whatever reason that did not happen, then I would respectfully submit that there is no power to do

anything, and that's what I'm trying to say in theory here, Your Honor.

THE COURT: And that's what I'm trying to understand by asking you about whether it is not true that this court has had subject matter Jurisdiction at least with respect to some portions of this dispute from day one by virtue of Interkal having pled both complete diversity and sufficient amount in controversy individually and jointly with Sumitomo in paragraph 8 of their complaint and you apparently having no information to refute that. Now, I agree --

MR. HANNAN: I do have in this sense, Judge, in this sense. There is -- the allegations as per paragraph 8 have been made. Do they comport with Rule ll? I don't know. What I'm saying here is it's clear now that Sumitomo Marine Management was not the real party in interest with respect to the alleged $300,000.00 claim; and as respects Interkal, if the claim for -- and we'll get into this in opening statement -- if we get to this business about recovery of lost premiums and it's not recoverable under Hadley against Baxendale as a matter of law, there is less than -- it is simply undisputed based on the numbers that Mr. Ritter has given you that there's less than $50,000 as respects Interkal, and it is this conundrum that we're confronted with by virtue of the fact that the plaintiffs have never made the right allegations.

THE COURT: Now, you have known since the day that this complaint was served upon you that Interkal was pleading independent diversity jurisdiction with respect to Interkal. Number two, you have known that a portion of the amount in controversy was represented by the increase in

insurance premiums. You've chosen to file no motions in that regard and then you stand here during opening statement of a trial in a case that was filed back in May of 1994 and you contend that at no point has this court ever had subject matter Jurisdiction over either Interkal or Sumitomo even employing the face of the complaint rule that's used in federal court. Do I understand that right?

MR. HANNAN: I have been involved in this case since late May of this year, Your Honor, and I have become aware of facts as of this Saturday which have raised these questions in my mind.

THE COURT: All right. I'll assume that your answer to the question is yes. You may proceed with anything else you want to say in your opening statement.

* * *

APPENDIX F

TRANSCRIPT OF TRIAL PROCEEDINGS OF 7/29/96

MR. RITTER: And, Your Honor, with that, the plaintiff rests.

THE COURT: Thank you.

Mr. Hannan.

MR. HANNAN: Your Honor, I have certain motions pursuant to Rule 52(c) to be made at the close of plaintiffs' case. Rather than burdening the record with all sorts of argument, I have reduced them to writing with the supporting memorandum. Copies have been furnished to counsel. I am submitting the originals for filing with the court this morning. It's my understanding, Your Honor, that in 1991 the provision of Rule 41(b), which dealt with motions at the close of plaintiffs' case in the trial with the court, has been transferred to Rule 52(c) and that a motion for involuntary dismissal formerly under 41(b) is now being made pursuant to Rule 52(c) by way of a motion for judgment for partial findings upon the facts of law at the close of the plaintiffs case.

(Pause in proceedings.)

THE COURT: I've read the two briefs submitted by Mr. Hannan. Mr. Ritter, do you wish to respond?

MR. RITTER: Your Honor, I thought we were handed two copies of the same thing so I've just looked at one --

MR. HANNAN: One's a brief and one's a motion.

MR. RITTER: -- but my quick reading, Your Honor, indicates that these issues have already been covered to a large extent in both the testimony and the previous trial briefs, and I don't believe there is anything further we need to respond at this time except to indicate that on page 8 of defendant's motion for Judgment on partial findings at the close of plaintiffs' case, it is correct that UIS is not obligated to defend.

* * *

DECISION OF THE COURT: Interkal also is alleged by the defendant in this motion to not be entitled to recover for alleged increases in insurance premiums because such losses, if any, were not within the contemplation of the parties' agreement as expressed in the 1981 asset purchase agreement. UIS also alleges that these alleged losses are speculative and were not established to the requisite certainty by the witness called to testify in this regard, Ms. Wendy Seidel, whose testimony has been received by deposition transcript and received -- or excuse me -- and reviewed by this court.

Ms. Seidel's testimony indicated that she could specifically identify the amounts attributable to this litigation with respect to the first two years but was not able to do so with any certainty with respect to the third year because of the factors that she set forth in her transcript. While the time necessary for those factors to now be known to the parties has now passed, the plaintiff has failed to come forward with any evidence with respect to its effect on the third year that they

are seeking by way of alleged losses in this case. After considering this matter, the court finds that any such losses, whether speculative or not, were not within the contemplation of the parties' agreement in fact as expressed in the 1981 asset purchase agreement, and the defendant's motion for partial Judgment with respect to these claims of the plaintiff is granted. The court further rules that with respect to the third year that these losses were further not established with the requisite certainty that would be required, even if the court had found that they were within the contemplation of the parties' agreement.

APPENDIX G

Case No. 4:94-CV-82

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

INTERKAL, INC., a Michigan Corporation,

and

SUMITOMO MARINE MANAGEMENT (U.S.A.), INC., a New Jersey Corporation, as subrogee of INTERKAL, INC., a Michigan Corporation

Plaintiffs,

v.

UIS, INC., a New York Corporation,

Defendant.

_____ /

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Interkal, Inc., et al. v. UIS, Inc.
No. 4:94-CV-82

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COMPLAINT FOR DECLARATORY JUDGMENT AND OTHER RELIEF

Interkal, Inc. (Interkal) and Sumitomo Marine Management (U.S.A.), Inc.(Sumitomo), Plaintiffs, for their Complaint against UIS, Inc. (UIS), Defendant, say:

PARTIES, JURISDICTION AND VENUE

1. Interkal is a Michigan corporation with its principal place of business located in Kalamazoo, Michigan. It manufactures bleachers and stadium seating principally for schools and sports arenas in the United States and other parts of the world.

2. Sumitomo is a New Jersey corporation with its principal place of business located in Warren, New Jersey. It is the insurance company that provided a policy of general liability insurance to Interkal for an alleged bleacher collapse that occurred at McDonough High School in Charles County, Maryland on or about September 9, 1988 and is subrogated to the claim of Interkal to the full extent of its payments as enumerated below. Under Rule 17(a) of the Federal Rules of Civil Procedure, Sumitomo is a real party in interest and is entitled to prosecute its claim.

3. UIS, previously named United Industrial Syndicate, Inc., is a New York corporation with its principal place of business located in New York, New York. It is a holding company which, on information and belief, owns several subsidiary corporations engaged in a variety of businesses.

4. This dispute arises out of the interpretation of the indemnification provisions of an Asset Purchase Agreement (the Agreement) dated February 3, 1981. A redacted copy deleting only dollar amounts, is attached as Exhibit A.

5. Interkal seeks a declaratory judgment, pursuant to 28 U.S.C. § 2201 et. seq., to determine questions of actual controversy between the parties about the terms of the Agreement as more fully described below.

6. Interkal also seeks recovery of attorney fees it incurred by reason of the failure and refusal of UIS to honor the Agreement.

7. Sumitomo seeks damages from UIS in connection with its refusal to honor the Agreement, which caused Sumitomo to expend approximately $75,000 in legal fees, costs and expenses in defending various actions filed in the Circuit Court for Charles County, Maryland, and also caused it to pay a substantial sum of money, in order to settle all of the outstanding claims against Interkal. The sum of money paid by Sumitomo on behalf of Interkal is to remain confidential by agreement between the plaintiffs and Sumitomo until an appropriate protective order is entered by this court.

8. Jurisdiction is based on 28 U.S.C. § 1332(a) because there is diversity of citizenship of the parties and the amount in controversy, with respect to each plaintiff separately and both plaintiffs together, exceeds the sum of Fifty Thousand ($50,000.00) Dollars. Jurisdiction over Interkal's claims is also based on 28 U.S.C. § 1367(a) because Interkal's claims are so related to Sumitomo's claims that they form part of the same case or controversy.

9. Venue is proper in this Court under 28 U.S.C. § 1391(b) (2) because a substantial part of the events giving rise to the case in controversy occurred in Michigan. The Agreement between Interkal and UIS was negotiated and closed in Michigan. The assets sold under the subject of the Agreement were located in Michigan before and after the sale. Further, the Agreement by its terms is governed by the laws of the State of Michigan.

GENERAL BACKGROUND

10. On and before December 31, 1980, a Michigan corporation then named Interkal, Inc. (Seller or old Interkal) was engaged in the business of manufacturing and selling bleachers and related products from its manufacturing facility in Kalamazoo, Michigan. At that time Seller was a wholly owned subsidiary of UIS, then named United Industrial Syndicate, Inc.

11. On or about January 29, 1981, WFD Holding Company (Purchaser or Interkal) was incorporated as a Michigan corporation to purchase certain assets from Seller.

12. On February 27, 1981, Seller executed and delivered a Bill of Sale to Purchaser pursuant to the terms of the Agreement. A redacted copy of the Bill of Sale, deleting only dollar amounts is attached as Exhibit B.

13. Upon closing, Purchaser changed its name to Interkal, Inc. (Interkal) and amended its Articles of Incorporation to reflect its name change. See attached Exhibit C.

14. Similarly, Seller changed its name from Interkal, Inc. (old Interkal) to Byzootal, Inc. See attached Exhibit D.

15. On information and belief, Byzootal, Inc. filed a Certificate of Dissolution with the Michigan Department of Commerce on March 10, 1983.

16. On information and belief, UIS, then named United Industrial Syndicate, Inc., was first qualified to do business in Michigan on February 7, 1978. UIS withdrew from the State of Michigan on May 15, 1991, on information and belief, by failing to file annual reports with the Michigan Department of Commerce.

17. The original shareholders of Interkal were former officers and employees of Seller. They formed a corporation to purchase certain assets of Seller to avoid having UIS discontinue the operations of Seller. Because it was acquiring certain assets of seller in difficult economic times, Purchaser was particularly concerned that all liability arising out of products manufactured by Seller, on or before December 31, 1980, remain solely the responsibility of Seller

and UIS. Paragraph 22 of the Agreement provides:

> 22. Seller's Indemnity. Seller and UIS agree to jointly and severally indemnify Purchaser against, and hold it harmless from . . . (iv) all damages, claims, losses, expenses, costs, judgments, liabilities and obligations incurred by Purchaser arising out of: (a) any product liability (personal injury or property damage) claim being made against Purchaser arising out of or relating to any product sold and shipped by Seller prior to December 31, 1980, whether such claim is based on the direct liability of Purchaser or Purchaser's liability as a successor of Seller; . . . (v) all reasonable attorneys' fees and disbursements and court costs incurred by Purchaser arising out of the foregoing . . .

18. The Agreement also describes the procedure to be followed if indemnification is sought by one party from the other. Paragraph 23 of the Agreement provides:

> 23. Indemnification Procedure. If any claim shall be asserted against any party in respect of which such party proposes to demand indemnification, such party shall notify the other parties to that effect with reasonable promptness after such assertion and such other parties shall have the right to assume the entire control of the defense, compromise or settlement of any such claim, through its own attorneys and at its expense, and, in connection therewith, such party shall cooperate fully to make available to such other parties all pertinent information under its control

> relating thereto. The party requesting such cooperation shall reimburse the other parties for all of their costs and expenses incurred in rendering such cooperation. (Emphasis added)

19. The Agreement also requires Interkal to reasonably assist Seller in product liability claims. Specifically, the Agreement in paragraph 25 provides:

> 25. Product Liability Claims. At the request of Seller, Purchaser shall cause its employees to reasonably assist Seller in preparing Seller's defense to any products liability claim made against Seller. All out-of-pocket expenses and employee expenses incurred by Purchaser in providing such assistance to Seller shall be promptly reimbursed by Seller to Purchaser.

20. Concerning the applicable state law, the Agreement-at paragraph 35 provides:

> 35. Law. This Agreement was negotiated in Michigan and shall be governed by and construed according to the laws of the State of Michigan.

21. On several occasions since February, 1981, Interkal has been named as a defendant in a product liability suit involving bleachers manufactured before December 31, 1980. With the exception of the McDonough cases described below, UIS has defended and indemnified Interkal at its sole expense and has reimbursed Interkal for expenses it incurred in assisting UIS with its defense in each suit.

SPECIFIC CLAIM

22. On or about September 9, 1988, a bleacher manufactured, sold and shipped by Seller to McDonough High School, Charles County, Maryland, before December 31, 1980, allegedly collapsed. Over a dozen students were allegedly injured. Subsequently, at least 16 students filed suit against UIS in the Circuit Court for Charles County, Maryland.

23. Following discovery, 15 students filed an amended complaint naming Interkal as a defendant in addition to UIS. The 16th student later filed one suit naming both UIS and Interkal as defendants. A typical amended complaint is attached as Exhibit E.

24. Interkal promptly requested that UIS defend and indemnify it in each of the actions in which it was added as an additional defendant. See attached Exhibit F. By letter dated October 9, 1992, UIS, Inc. refused to defend or indemnify Interkal with respect to the claims. See attached Exhibit G. As a result, Interkal, Inc. referred the suits to its insurer, Sumitomo, which retained counsel to defend it in Maryland.

25. Interkal, through Sumitomo, has settled all of the outstanding claims against it with respect to the McDonough School cases for sums which are to remain confidential by agreement between the plaintiffs and Sumitomo on behalf of Interkal pending entry of an appropriate protective order in this case.

26. As a result of the failure and refusal of UIS to

indemnify Interkal in connection with the Charles County, Maryland bleacher cases referred to above, Interkal has incurred attorneys' fees and other expenses in assisting Sumitomo and UIS in defending the Maryland cases, notwithstanding UIS's breach of the Agreement.

COUNT I

INTERKAL CLAIM FOR DECLARATORY RELIEF

27. Since execution of the Agreement, Interkal has assisted UIS in a variety of ways concerning issues relating to bleachers that were manufactured, sold and shipped before December 31, 1980. These bleachers are commonly referred to as being of the "old style Vecta-Brunswick design." Significant design changes were made to the bleachers starting in 1976. Interkal never manufactured the old style Vecta-Brunswick bleachers.

28. Other than with regard to the Charles County, Maryland bleacher cases, UIS has reimbursed Interkal for expenses incurred in providing support and assistance in defending claims arising out of bleachers sold and shipped before December 31, 1980, and UIS has honored its indemnification obligations under the Agreement.

29. Paragraph 22 of the Agreement clearly and unambiguously requires UIS to indemnify Interkal and hold it harmless from all product liability claims made against it arising out of or relating to any product sold and shipped by Seller before December 31, 1980 whether such claim is based on the direct liability of Interkal or Interkal's liability as

successor of Seller.

30. A real case in controversy exists because UIS refused to defend and indemnify Interkal in the Maryland cases on the basis that the claims asserted against Interkal by the plaintiffs in the McDonough High School litigation consist solely of allegations of Interkal's own acts of negligence occurring well after the Agreement was signed. It is Interkal's position that the Agreement requires UIS to indemnify it with respect to any direct liability of Purchaser relating to any product sold and shipped by Seller before December 31, 1980.

31. All actions taken by Interkal with respect to products manufactured, sold and shipped before December 31, 1980, were undertaken pursuant to the provision of paragraph 25 of the Agreement and with the knowledge and consent of UIS. The failure and refusal of UIS to honor the Agreement in the McDonough school cases is unconscionable and Interkal believes UIS may breach the Agreement in the future unless this court declares that UIS is obligated under the terms of the Agreement to indemnify and defend Interkal with respect to any other present or future claims arising out of or relating to bleachers manufactured sold and shipped by Seller on or before December 31, 1980.

COUNT II

BREACH OF CONTRACT - DAMAGES (INTERKAL)

32. As a result of the failure and refusal of UIS to defend and indemnify Interkal in connection with the Charles

County, Maryland bleacher cases referred to above, Interkal has incurred attorneys fees and expenses in the amount of $22,297.52 in assisting Sumitomo and UIS under the terms of the Agreement, notwithstanding UIS's breach of the Agreement. Also, Interkal incurred in-house expense in the amount of $5,100.00 in fabricating and shipping a demonstration bleacher for use at trial in Maryland which should be reimbursed by UIS under the terms of the Agreement. Finally, the refusal of UIS to defend and indemnify Interkal has, on information and belief, resulted in a significant increase in its insurance premiums which increase is expected to continue into the future regardless of the outcome of this litigation.

COUNT III

BREACH OF CONTRACT - DAMAGES (SUMITOMO)

32. Sumitomo expended nearly $75,000.00 in legal fees, costs and expenses to defend Interkal in connection with the Amended Complaints that were filed against Interkal in the Circuit Court for Charles County, Maryland in the actions referenced above.

33. In addition, Sumitomo paid substantial sums of money on behalf of Interkal, its insured, in order to settle all of the out standing claims asserted against Interkal in the McDonough School cases. Because of a confidentially agreement between the plaintiffs and Sumitomo on behalf of Interkal, the sums so paid shall remain confidential until the entry of an appropriate protective order in this case.

34. The expenditure of the monies, fees, costs and expenses by Sumitomo on behalf of Interkal was the direct result of the failure and refusal of UIS to honor its obligation to indemnify Interkal under the terms of the Agreement in connection with the Charles County, Maryland bleacher cases referred to above.

35. Sumitomo has sustained damages in the amounts set forth above as of the date of the filing of this Complaint, and seeks to recover those damages from UIS as they were the direct and proximate result of the wrongful acts and breach of contract by UIS in failing to defend and indemnify Interkal in the McDonough School cases.

WHEREFORE, Interkal and Sumitomo pray:

A. For the entry of a declaratory judgment providing that UIS is obligated to defend, indemnify and hold harmless Interkal with respect to any product liability (personal injury or property damage) claim made against Interkal arising out of or relating to any product sold and shipped by Seller before December 31, 1980 whether such claim is based on the direct liability of Interkal or Interkal's liability as successor of Seller, including but not confined to the McDonough School cases referred to above;

B. For a money judgment in the amount of all reasonable attorneys' fees, disbursements, court costs and expenses incurred by Interkal and Sumitomo in defending Interkal in the McDonough School cases;

C. For a money judgment for all sums paid on

behalf of Interkal by Sumitomo in settlement of all outstanding claims asserted against Interkal in the McDonough School cases;

D. For a money judgment for all labor, material and incidental costs incurred by Interkal in providing assistance to Sumitomo and UIS in defending the McDonough School cases; and,

E. For a money judgment in the aggregate amount of increased annual premiums for insurance coverage incurred by Interkal as a result of the failure and refusal of UIS to defend and indemnify it in the McDonough School cases.

Dated: May 25, 1994

MILLER, CANFIELD, PADDOCK AND
STONE, P.L.C.
By: /s/_____
Charles E. Ritter
Attorneys for Interkal
BUSINESS ADDRESS:
444 West Michigan Avenue
Kalamazoo, Michigan 49007
(616) 381-7030

Interkal, Inc., et al. v. UIS, Inc.
No. 4:94-CV-82

DeCARO, DORAN, SICILIANO, GALLAGHER,
SONNTAG & DeBLASIS
By: /s/_____
Jeffrey R. DeCaro
Attorneys for Sumitomo
BUSINESS ADDRESS:
4601 Forbes Boulevard
Suite 200
P.O. Box 40
Landham, Maryland 20703-0040
(301) 306-4300

EXHIBIT A

ASSET PURCHASE AGREEMENT

AGREEMENT made this 3rd day of February, 1981, by and among INTERKAL, INC., a Michigan Corporation, with its principal offices at 2605 East Kilgore Road, Kalamazoo, Michigan, herein "SELLER", UNITED INDUSTRIAL SYNDICATE, INC., a New York Corporation, with its principal offices at 600 Fifth Avenue, New York, New York 10020, herein "UIS", and WFD HOLDING COMPANY, a Michigan Corporation, herein "PURCHASER"

Background

SELLER is a wholly-owned subsidiary of UIS. SELLER is in the business of manufacturing and selling gymnasium seating and related products from its sole office and plant in Kalamazoo, Michigan. SELLER wishes to sell certain of its assets as set forth in this Agreement.

PURCHASER is a corporation recently formed for the purpose of purchasing certain of the assets of SELLER.

SELLER wishes to sell and PURCHASER wishes to purchase certain of the assets of SELLER upon the terms and conditions set forth in this Agreement.

Terms and Conditions of Agreement

THEREFORE, in consideration of the facts set forth

above, and the promises, terms and conditions set forth below, the parties hereby agree as follows:

1. Sale of Assets. At the Closing as defined below, SELLER shall sell and PURCHASER shall purchase, all of the assets of SELLER existing on the Closing Date, tangible and intangible, real, personal and mixed, wherever situated and whether or not specifically referred to herein including, but not limited to, cash, accounts receivable, inventories of raw materials, work in process and finished goods, machinery, equipment, tools, jigs, dies, fixtures, patterns, office furniture and equipment, supplies, patents, trade secrets, good will, general intangibles, contract rights, all of SELLER'S right, title and interest in and to the name "Interkal, Inc.", and any unfilled contracts for sales of products, the foregoing hereinafter collectively referred to as the "Sold Assets".

2. Purchase Price for Sold Assets. The purchase price for the Sold Assets shall be Dollars ($), plus the assumption of certain liabilities as set forth herein.

3. Payment of the Purchase Price. Payment of the purchase price for the Sold Assets shall be made by PURCHASER to SELLER, as follows:

A. At the Closing, PURCHASER shall deliver to SELLER a cashier's or certified check in the amount of Dollars ($).

B. The balance of the purchase price shall be paid in accordance with the terms and

conditions of a Promissory Note, substantially in the form of Exhibit "A" attached hereto, which Promissory shall be delivered by PURCHASER to SELLER. The Promissory Note shall contain the following terms:

(i) Face amount equal to Dollars ($).

(ii) Interest on the unpaid balance at fourteen percent (14%) per annum.

(iii) Principal payments in the amounts and on the dates as follows:

January 15, 1982 - $
January 15, 1983 - $
January 15,1984 - $
January 15, 1985 - $
January 15, 1986 - $

(iv) Interest payments for each quarter of a year shall be due and payable fifteen (15) days after the end of each calendar quarter.

(v) Prepayment may be made in whole or in part at any time; provided, however, that such prepayments shall be applied to installments of principal in the inverse order of maturity. The payment of the Promissory Note shall be subordinate to the payment of all indebtedness of PURCHASER to The American National Bank and Trust Company of Michigan, provided that so long as PURCHASER is not

in default with respect to such indebtedness to The American National Bank and Trust Company of Michigan, and further provided that SELLER has not been notified by such bank of any default, PURCHASER may make the payments required by the Promissory Note.

4. Security. In order to secure payment of the Promissory Note, PURCHASER shall cause all of its outstanding capital stock to be pledged to SELLER, substantially in accordance with the terms and conditions of a Pledge Agreement, herein "Pledge Agreement", which is attached hereto as Exhibit "B".

5. Assumption of Liabilities. PURCHASER shall neither assume nor be liable for any obligations, duties, or liabilities of SELLER except as set forth in this Agreement. On the Closing Date, PURCHASER shall assume:

A. All of SELLER'S obligations which are reflected on the unaudited balance sheet of SELLER as of October 30, 1980, and all obligations of SELLER incurred after October 30, 1980, and prior to the Closing Date in the ordinary and regular course of business, except:

(i) Those products liability obligations described in paragraph 22 (iv).

(ii) All obligations of SELLER to UIS,

incurred on or before December 31, 1980.

(iii) All obligations of SELLER for federal income taxes and Michigan Single Business Tax for the period ending December 31, 1980.

6. Delivery of Sold Assets and Conveyances. On the Closing Date, SELLER shall grant possession of the Sold Assets to PURCHASER and shall deliver to PURCHASER such bills of sale, conveyances, assignments, and other instruments of transfer as shall be requested by PURCHASER or its counsel to effectively vest in PURCHASER all of SELLER'S right, title and interest in and to the Sold Assets. On the Closing Date, SELLER shall deliver to PURCHASER such instruments as are necessary to enable PURCHASER to adopt "Interkal, Inc." as its corporate name in the State of Michigan.

7. Possession of Plant. As part of the sale of the Sold Assets described herein, SELLER shall assign to PURCHASER all of its rights and PURCHASER shall assume all of SELLER'S duties regarding SELLER'S possession of a portion of the building located at 2605 East Kilgore Road, Kalamazoo, Michigan, herein the "Interkal Area", pursuant to an Agreement for Sale of Real Estate between SELLER and The Upjohn Company, herein "Upjohn", dated May 7, 1979. SELLER and PURCHASER shall use their best efforts to obtain the written consent of Upjohn to SELLER'S assignment to PURCHASER of its rights to possession of the Interkal Area.

8. Agreements and Orders. On the Closing Date, SELLER shall assign its rights and PURCHASER shall assume SELLER'S duties under the following:

A. All of SELLER'S unfilled purchase orders for inventory and supplies existing on the Closing Date;

B. All of SELLER'S undelivered sales orders (backlog); and

C. The agreements of SELLER set forth on Schedule 1 attached hereto existing on the Closing Date.

D. All of SELLER'S obligations under warranty claims.

At the Closing, SELLER shall deliver to PURCHASER all of SELLER'S documentation regarding the agreements and orders set forth above, together with all customer deposits regarding any unfilled sales orders.

9. Actions Prior to Closing Date: Prior to the Closing:

A. SELLER shall permit PURCHASER and its authorized representatives to have full access to the premises of SELLER and the books, files, and records of SELLER at any

reasonable time and in any reasonable manner, and furnish PURCHASER such financial operating data and other information with respect to SELLER'S business and the Sold Assets as PURCHASER shall reasonably request;

B. SELLER and PURCHASER shall each diligently pursue the conditions precedent to the closing of this Agreement set forth in section 15 below;

C. SELLER shall conduct its business in the ordinary course and shall use its best efforts: to preserve substantially intact its current business operations; maintain its properties in good working order and repair; and preserve its present business relationships with customers, suppliers, and others having significant business relations therewith; provided, however, that UIS shall not be under any obligation to advance funds to SELLER from and after December 31, 1980. SELLER shall not, except in accordance with its regular and ordinary past practices, enter into any material contracts, commitments, or agreements without the prior consent of PURCHASER;

D. SELLER shall maintain in full force and effect until the Closing Date the insurance currently carried by SELLER regarding its

properties. SELLER shall promptly advise PURCHASER of any fire, accident or other casualty occurring on or before the Closing Date which in the aggregate materially affects the value of SELLER'S properties;

E. SELLER shall not dispose of any of the Sold Assets except for sale or use in the ordinary course of the business of SELLER;

F. SELLER shall duly convene a special meeting of its Shareholder and Board of Directors for the purpose of voting upon approval of this Agreement and the transactions contemplated hereby, including, but not limited to, the transfer of substantially all of the assets of SELLER to PURCHASER;

G. SELLER will take all corporate action necessary to change its corporate name or any assumed name, effective upon the Closing, to a name other than, and not similar to, "Interkal, Inc.", and from and after the Closing Date, SELLER will cease and desist from using as its corporate name in its operations or otherwise, the name "Interkal, Inc."

10. Closing. The closing of the sale and purchase of the Sold Assets, herein the "Closing", shall take place at the offices of PURCHASER'S legal counsel, Brown, Colman & DeMent, P.C., 125 West Walnut Street, Kalamazoo,

Michigan, as promptly as possible after December 31, 1980, herein the "Closing Date". In the event the Closing does not take place on or before March 31, 1981, this Agreement may be terminated pursuant to section 17 below.

11. Events at the Closing. At the Closing:

A. SELLER shall deliver to PURCHASER:

(i} The bills of sale, assignments, conveyances and other instruments of transfer described in section 6 above;

(ii) All of SELLER'S books and records regarding its business and assets, except those hocks and records pertaining to the corporate proceedings of SELLER which are not directly related to the business operations or assets of SELLER;

(iii) A specific assignment of all of SELLER'S right, title and interest in and to the name "Interkal, Inc." and any documents necessary to enable PURCHASER to assume such name as its corporate name;

(iv) Assignments of the agreements and orders described in section 8 above;

(v) The opinion of Messrs. Spengler, Carlson, Gubar & Brodsky, as described in section 15 A.(iii).

A. PURCHASER shall deliver to SELLER:

(i) Cash in the amount of ($) ;

(ii) The Promissory Note, properly executed;

(iii) The Pledge Agreement, properly executed;

(iv) An assumption of SELLER'S duties under the Assumed Liabilities described in sections 5 and 8 above; and

(v) The opinion of Brown, Colman & DeMent, P.C. as described in section 15

B.(iii) below.

12. Actions Subsequent to Closing. Subsequent to the Closing Date:

A. PURCHASER and SELLER shall, at the request of the other, furnish, execute and deliver such documents, instruments, opinions of counsel, certificates, notices or other further assurances as counsel for the requesting party shall reasonably require as necessary or convenient to consummate the transactions described in this Agreement;

B. PURCHASER shall perform the obligations of SELLER under the Assumed Liabilities;

C. SELLER and PURCHASER shall retain and preserve the books and records of SELLER as set forth in section 24 below;

D. SELLER and PURCHASER shall take the actions regarding SELLER'S Pension Plans as set forth in section 16 below.

13. Representations and Warranties of SELLER. SELLER and UIS, jointly and severally, represent and warrant to PURCHASER as follows:

A. Organization, Good Standing, etc. SELLER is a corporation duly organized, validly existing and in good standing under the laws of the State of Michigan and has all requisite power and authority to own its properties and to carry on its business as now being conducted.

B. Effect of Agreement. The execution and delivery of this Agreement by SELLER and the consummation by SELLER of the transactions provided for herein: have been or will be duly authorized by the Board of Directors and Shareholder of SELLER; to the best of their knowledge, do not require the consent, approval or authorization of or filing with any person or public authority; and to the best of their knowledge, will not violate any law, statute, regulation, injunction, order or decree of any governmental agency or

authority or court, or conflict with or result in a breach of or constitute a default under any of the terms or provisions of any mortgage, note, bond or indenture or under any other commitment, contract, agreement, lease, license or other instrument or obligation to which SELLER is a party or by which it or any of its properties may be bound.

C. Litigation. To the best of their knowledge and except as set forth in Schedule 2 attached hereto, SELLER is not a party to or threatened with any litigation, governmental or other proceeding, investigation, strike or other labor dispute or other controversy, and there is no outstanding order, writ, injunction, decree or ruling of any court or governmental agency affecting SELLER or the Sold Assets.

D. Brokers' and Finders' Fees. No agent, broker, person or firm acting on behalf of SELLER or UIS or under their authority is or will be entitled to any commission or brokers' or finders' fee from any of the parties hereto in connection with any of the transactions contemplated herein.

E. Undisclosed Liabilities. To the best of their knowledge, there are no obligations, liabilities, commitments, agreements or any other matters of a material nature which are known by SELLER or UIS and have not been

previously disclosed to William Dearborn as President of SELLER.

F. Limitations on Representations and Warranties. PURCHASER acknowledges that, to the extent such matters have been disclosed or known by William Dearborn, its President, it is aware of the assets, liabilities, obligations and financial condition of the business of SELLER.

14. Representations and Warranties of PURCHASER. PURCHASER represents and warrants to SELLER and UIS as follows:

A. Organization, Good Standing, etc. On the Closing Date, PURCHASER will be a corporation duly organized, validly existing and in good standing under the laws of the State of Michigan and have all requisite power and authority to own properties and to carry on its business as contemplated herein.

B. Effect of Agreement. The execution and delivery of this Agreement by PURCHASER and the consummation by PURCHASER of the transactions provided for herein have been or will be duly authorized by the Board of Directors of PURCHASER, do not require the consent, approval or authorization of or filing with any person or public authority, and will not violate any statute, regulation, injunction,

order or decree of any governmental agency or authority or court, or conflict with or result in a breach of or constitute a default under any of the terms or provisions of any mortgage, note, bond or indenture or under any other commitment, contract, agreement, lease, license or other instrument or obligation to which PURCHASER is a party or by which it or any of its properties may be bound.

15. Conditions Precedent to Closing.

A. Conditions Precedent to the Obligations of PURCHASER. The obligations of PURCHASER under this Agreement are subject to the satisfaction on or before the Closing Date of each of the following additional conditions, except to the extent that any such conditions may have been waived by PURCHASER in writing:

(i) The representations and warranties of SELLER contained in section 13 shall be true and correct on and as of the Closing Date, except to the extent that such representations are expressly made as of another specified date and, as to such representations, the same shall be true and correct as of such specified date.

(ii) SELLER and UIS shall have

performed and complied with all obligations, covenants, agreements and conditions required by this Agreement to be performed and complied with by either of them prior to or at the Closing Date.

(iii) PURCHASER shall have received an opinion of Messrs. Spengler, Carlson, Gubar & Brodsky, dated the Closing Date and in form and substance satisfactory to PURCHASER and its counsel, to the effect that:

(a) SELLER is a corporation duly organized, validly existing and in good standing under the laws of the State of Michigan, and has all requisite power to carry on its business as now being conducted.

(b) This Agreement has been duly authorized, executed and delivered by SELLER and constitutes the legal, valid and binding obligation of SELLER enforceable in accordance with its terms; all actions necessary on the part of SELLER, its Shareholder and Board of Directors to authorize the consummation of this

Agreement and the transactions provided for herein have been legally and validly taken, and to the best of counsel's knowledge, execution of this Agreement as of the date of this Agreement, did not, and the consummation of the transactions provided for herein on the Closing Date will not: (i) violate any law, statute, regulation, injunction, order or decree of any governmental agency or authority or court; or (ii) conflict with or result in a breach of or constitute a default under any of the terms and provisions of any mortgage, lease, note, bond or indenture or under any other commitment, contract, agreement, license or other instrument or obligation to which PURCHASER is a party or by which it or any of its properties may be bound.

(c) The documents and instruments of conveyance and transfer delivered to PURCHASER at the Closing effectively vest in

PURCHASER all of SELLER'S right, title and interest in and to all of the Sold Assets. To the best of counsel's knowledge, such documents of conveyance and transfer have vested good and marketable title to the Sold Assets in PURCHASER, free and clear of all mortgage, liens, pledges, restrictions, charges, security interests, or encumbrances of any nature whatsoever.

(d) Such counsel knows of no actions, suits or proceedings pending against SELLER in any court or before any federal, state, municipal or other governmental agency or instrumentality, which if determined adversely to SELLER, could result in any materially adverse change in the business, properties, operations, prospects or assets of in the condition, financial or otherwise, of SELLER.

In giving the foregoing opinion, Messrs. Spengler, Carlson, Gubar & Brodsky may rely, to the extent it deems appropriate, on certificates of SELLER and opinions of other

counsel satisfactory to PURCHASER, provided that the extent of such reliance is specified in their opinion and copies of such certificates or opinions relied upon shall be furnished to PURCHASER.

(iv) PURCHASER shall have received such other documents as it or its counsel shall have reasonably requested in order to satisfy it that the conditions to SELLER'S obligations hereunder have been met.

(v) From the date of this Agreement to the Closing Date, no fire or other casualty shall have destroyed a material part of the Sold Assets, whether such casualty is covered by insurance or not and there shall have occurred no event which has or reasonably may have a material adverse affect upon the business of SELLER or the Sold Assets.

(vi) PURCHASER shall have received a written consent from Upjohn to the assignment by SELLER to PURCHASER of SELLER'S rights to possession of the Interkal Area.

(vii) PURCHASER shall have obtained financing in an amount and form satisfactory to PURCHASER so as to enable PURCHASER to consummate the transactions contemplated herein and operate its business after the Closing Date in a manner similar to the business conducted by SELLER prior to

the Closing Date.

(viii) PURCHASER shall have succeeded to SELLER'S rights and duties under an Agreement between SELLER and the Michigan Council of Industrial Workers and Local 2776 of the United Brotherhood of Carpenters and Joiners of America, A.F. of L.- C.I.O., signed March 27, 1979, effective October 1, 1978.

B. Conditions Precedent to the Obligations of SELLER and UIS. The obligations of SELLER and UIS under this Agreement are subject to the satisfaction on or before the Closing Date of each of the following additional conditions, except to the extent that any of such conditions may have been waived by SELLER and UIS in writing:

(i) The representations of PURCHASER contained in section 14 shall be true and correct on and as of the Closing Date, except to the extent that such representations are expressly made as of another specified date and, as to such representations, the same shall be true and correct as of such specified date.

(ii) PURCHASER shall have performed and complied with all obligations, covenants and conditions required by this Agreement to be performed or complied with by it prior to or at the Closing Date.

(iii) SELLER shall have received an opinion of Brown, Colman & DeMent, P.C., dated the Closing Date and in form and substance satisfactory to SELLER and its counsel, to the effect that:

(a) PURCHASER is a corporation duly organized, validly existing and in good standing under the laws of the State of Michigan and has all requisite power to carry on its business as now being conducted.

(b) This Agreement, the Promissory Note and Pledge Agreement have been duly authorized, executed and delivered by PURCHASER and constitute the legal, valid and binding obligations of PURCHASER enforceable in accordance with their terms; all actions necessary on the part of PURCHASER to authorize the consummation of this Agreement, the Promissory Note and Pledge Agreement and the transactions provided for herein have been legally and validly taken; and to the best of counsel's knowledge, execution of this Agreement, the Promissory Note and Pledge Agreement do not, and the consummation of the transactions provided for herein on the Closing

Date will not, violate any law, statute, regulation, injunction, order or decree of any governmental agency or authority or court, or conflict with or result in a breach of or constitute a default under any of the terms and provisions of any mortgage, lease, note, bond or indenture or under any other commitment, contract, agreement, license or other instrument or obligation to which PURCHASER is a party or by which it or any of its properties may be bound.

(c) Such counsel knows of no actions, suits or proceedings pending against PURCHASER in any court or before any federal, state, municipal or other governmental agency or instrumentality, which if determined adversely to PURCHASER, could result in any materially adverse change in the business, properties, operations, prospects or assets, or in the condition, financial or otherwise, of PURCHASER.

In giving the foregoing opinion, Brown, Colman & DeMent, P.C. may rely, to the extent it deems appropriate, on certificates of officers of PURCHASER and opinions of other counsel satisfactory to SELLER, provided that the extent of such reliance is specified in its opinion and copies of such

certificates or opinions relied upon shall be furnished to SELLER.

(iv) SELLER shall have received such other documents as it or its counsel shall have reasonably requested in order to satisfy it that the conditions to SELLER'S obligations hereunder have been met.

16. Pension Plans. PURCHASER agrees within thirty (30) days after the Closing, to adopt, effective as of January 1, 1981, pension plans, herein "PURCHASER'S Plans", substantially similar to the Interkal, Inc. Pension Plan for Hourly Employees and the Interkal, Inc. Pension Plan for Salaried Employees, herein "SELLER'S Plans". PURCHASER'S Plans shall provide benefits to participants, retired or terminated participants, or persons claiming under them, no less favorable in any respect than those provided by SELLER'S Plans. PURCHASER'S Plans will give all persons who were participants of SELLER credit for all purposes, including, but not limited to, benefit accrual and vesting, in the same manner as provided in SELLER'S Plans.

SELLER and PURCHASER agree that as promptly as possible, SELLER'S Plans shall be merged into and with each respective Plan of PURCHASER.

SELLER, UIS and PURCHASER shall promptly cause to be furnished to each other, all data, documents, and other material reasonably necessary to accomplish the transactions set forth in this paragraph.

17. Termination. Either party may terminate this Agreement by notice given to the other on or before March 31, 1981, if a condition precedent to its performance as set forth in section 15 shall not be fulfilled and such condition cannot be fulfilled on or before March 31, 1981. In the event this Agreement is not closed on or before March 31, 1981, for any reason, either party may terminate this Agreement by notice given to the other. Such right to terminate shall be the sole remedy of the party electing to terminate; provided, however, that should such termination be the result of failure of any of the conditions precedent described in section 15 B. above, SELLER may pursue any remedies at law or equity it may have against PURCHASER, and should such termination be the result of failure of any of the conditions precedent described in section 15 A. above (except the conditions precedent described in section 15 A.(vi) (vii) and (viii) above), PURCHASER may pursue any remedies at law or equity it may have against SELLER.

18. Confidential Information. Each party agrees that, unless and until the Closing shall have been consummated, it and its representatives will hold in strict confidence all information and documents received from the other party and, if the transaction herein contemplated shall not be consummated, each party will continue to hold such information and documents in strict confidence and will return to such other party all such documents (including the documents annexed to this Agreement) then in such receiving party's possession without retaining copies thereof; provided, however, that each party's obligation under this section 18 to maintain such confidentiality shall not apply to any information or documents that are in the public domain at the

time furnished by the other party or that become in the public domain thereafter through any means other than as a result of any act of the receiving party or of its agents, officers, directors or stockholders which constitutes a breach of this Agreement.

19. Power of Attorney. Without limitation of any provision of this Agreement, effective upon the Closing, SELLER constitutes and appoints PURCHASER and its successors and assigns the true and lawful attorney of SELLER as to the items listed below in this paragraph, with full power of substitution, in the name of PURCHASER or in the name of SELLER, but for the benefit and at the expense and risk of PURCHASER: (i) to collect for the account of PURCHASER all items transferred or intended to be transferred to PURCHASER hereunder; (ii) to institute and prosecute all proceedings against third parties which PURCHASER may deem proper in order to collect, assert or enforce any claim, right or title of any kind in or to the assets, properties and business of SELLER transferred to PURCHASER hereunder, and to do all such acts and things in relation thereto as PURCHASER shall deem advisable; and (iii) to take all actions which PURCHASER may deem proper in order to provide for PURCHASER the benefits under any claims, contracts, agreements, arrangements, licenses, leases, commitments, sales orders, purchase orders or other documents or instruments of SELLER transferred or intended to be transferred to PURCHASER hereunder. SELLER acknowledges that these powers are coupled with an interest and, upon the Closing, shall not be revocable by SELLER in any manner or for any reason. PURCHASER shall be entitled to retain for its own account any amounts collected pursuant

to the foregoing power, including any amount payable as interest in respect thereof.

20. Survival of Representations. All statements contained in any Exhibit, Schedule, document, certificate or other instrument delivered by or on behalf of any party hereto, or in connection with the transactions contemplated hereby, shall be deemed to be representations and warranties made pursuant to this Agreement and all representations, warranties, and agreements made by the parties pursuant to this Agreement shall survive the consummation of the transactions contemplated by this Agreement for a period of one (1) year after the Closing Date.

21. PURCHASER'S Indemnity. PURCHASER agrees to indemnify SELLER and hold it harmless from all liabilities, losses, costs, expenses, and damages (including, without limitation, reasonable attorneys' fees and disbursements and court costs incurred by SELLER) suffered by SELLER as a result of any breach or default by PURCHASER of or under any of the covenants, representations, warranties or terms of this Agreement, or any other agreement relating to the transaction contemplated in this Asset Purchase Agreement.

22. SELLER'S Indemnity. SELLER and UIS agree to jointly and severally indemnify PURCHASER against, and hold it harmless from: (i) all debts, liabilities and obligations of SELLER, whether accrued, absolute, contingent or otherwise, other than the Assumed Liabilities; (ii) all liabilities and obligations arising out of SELLER'S operation of its business prior to December 31, 1980, other than the

Assumed Liabilities; (iii) all liabilities, losses, costs, expenses, and damages suffered by PURCHASER as a result of any breach or default by SELLER or UIS of or under any of the SELLER'S covenants, representations or warranties made in this Agreement; (iv) all damages, claims, losses, expenses, costs, judgments, liabilities and obligations incurred by PURCHASER arising out of: (a) any product liability (personal injury or property damage) claim being made against PURCHASER arising out of or relating to any product sold and shipped by SELLER prior to December 31, 1980, whether such claim is based on the direct liability of PURCHASER or PURCHASER'S liability as a successor of SELLER; and (b) any claim against PURCHASER for indemnification or reimbursement by any third person arising out of SELLER'S contractual liability for products liability claims regarding products sold by persons other than SELLER prior to December 31, 1980; and (v) all reasonable attorneys' fees and disbursements and court costs incurred by PURCHASER arising out of the foregoing. With regard to the indemnification set forth in this paragraph, except those claims set forth in (iv) neither UIS nor SELLER shall have any liability until and unless the aggregate amount in respect of which indemnification is applicable shall exceed Dollars ($) and such liability shall only extend to an aggregate amount in excess of Dollars ($).

23. Indemnification Procedure. If any claim shall be asserted against any party in respect of which such party proposes to demand indemnification, such party shall notify the other parties to that effect with reasonable promptness after such assertion and such other parties shall have the right to assume the entire control of the defense, compromise or

settlement of any such claim, through its own attorneys and at its expense, and, in connection therewith, such party shall cooperate fully to make available to such other parties all pertinent information under its control relating thereto. The party requesting such cooperation shall reimburse the other parties for all of their costs and expenses incurred in rendering such cooperation.

24. Preservation of Records. SELLER and PURCHASER shall retain and preserve the books and records of SELLER held by either of them for a period of ten (10) years after the Closing Date. In the event any party hereto wishes to dispose of any such books and records after the expiration of such ten (10) year period, such party shall notify the other parties of its intent to dispose of such records and allow such other parties to take possession of such records, at their expense. SELLER and PURCHASER, their counsel and their accountants, shall have the right during such period to make copies of such books and records or to obtain temporary possession thereof as may be reasonably necessary. PURCHASER shall furnish to SELLER and its counsel and accountants, promptly after written request therefor, all information necessary for SELLER to timely prepare its federal, state or local income tax returns for the period in which the Closing occurs.

25. Product Liability Claims. At the request of SELLER, PURCHASER shall cause its employees to reasonably assist SELLER in preparing SELLER'S defense to any products liability claim made against SELLER. All out of pocket expenses and employee expenses incurred by PURCHASER in providing such assistance to SELLER shall

be promptly reimbursed by SELLER to PURCHASER.

26. Bulk Sales Law. SELLER and PURCHASER hereby waive compliance with the bulk transfer provisions of the Michigan Uniform Commercial Code. SELLER and UIS hereby, jointly and severally, covenant and agree to indemnify and hold PURCHASER harmless against any and all damages, claims, losses, expenses, costs, liabilities and obligations (including reasonable attorneys' fees) resulting from any claim by a creditor of SELLER under any such bulk transfer provisions with respect to any of the Sold Assets to be transferred to PURCHASER in accordance with this Agreement; provided, however, that SELLER shall have no liability pursuant to this paragraph or otherwise to PURCHASER should any claim by a creditor of SELLER relate to a liability of SELLER assumed by PURCHASER in this Agreement.

27. Notices. All notice requirements and other communications indicated shall be deemed given when personally delivered or on the third succeeding business day after being
mailed by registered or certified nail, return receipt requested, to the appropriate party at its address below (or at such other address as shall be specified by notice given hereunder):

SELLER and UIS: United Industrial Syndicate, Inc.
600 Fifth Avenue
New York, New York 10020

with a copy to: Bruce A. Rich, Esq.
Spengler, Carlson, Gubar & Brodsky

280 Park Avenue
New York, New York 10017

PURCHASER: Mr. William F. Dearborn
Interkal, Inc.
2605 East Kilgore Road
Kalamazoo, Michigan 49003

with a copy to: Eric V. Brown, St.
BROWN, COLMAN & DEMENT, P.C.
125 West Walnut Street
Kalamazoo, Michigan 49007

28. Payment of Expenses. Except as specifically described herein, each of the parties shall pay all of the costs incurred by it incident to the preparation, execution and delivery of this Agreement and the performance of its obligations hereunder, including, without limitation, the fees and disbursements of counsel, accountants and consultants, whether or not the transactions contemplated by this Agreement shall be consummated.

29. Benefit and Assignment. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns.

30. Entire Agreement and Amendment. This writing and the attached Schedules contain the entire agreement between the parties with respect to the matters described herein and are a complete and exclusive statement as to the terms thereof and supersede all previous agreements.

This Agreement may not be altered or modified except by a writing signed by the party against whom such alteration or modification is sought.

31. Invalidity. The invalidity of any provision of this Agreement shall not affect the validity of the remainder of any such provision or the remaining provisions of this Agreement.

32. Interpretation. The paragraph headings included in this Agreement have been used solely for convenience and shall not be used in conjunction with the interpretation of this Agreement.

33. Waiver. The failure of any party at any time to require performance by another party of any provision of this Agreement shall not be deemed a continuing waiver of that provision or a waiver of any other provision of this Agreement and shall, in no way affect the full right to require such performance from such other party at any time thereafter.

34. Severability. This Agreement and the transactions contemplated herein constitute one sale and shall not be divisible in any manner. A breach of any portion of this Agreement shall be deemed a breach of the whole Agreement.

35. Law. This Agreement was negotiated in Michigan and shall be governed by and construed according to the laws of the State of Michigan.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed on the day and year first set forth above.

SELLER: INTERKAL, INC.

By: /s/_____
Its: Exec. Vice President

UIS: UNITED INDUSTRIAL SYNDICATE, INC.

By: /s/_____
Its: President

PURCHASER: WFD HOLDING COMPANY

William F. Dearborn
Its: President

Exhibits B Through H to Complaint, not printed

APPENDIX H

No. 4:94-CV-82

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

INTERKAL, INC., a Michigan Corporation,

Plaintiff,

v.

UIS, INC., a New York Corporation,

Defendant.

_____ /

David W. McKeague
U.S. District Judge

Charles E. Ritter (P19473)
Miller, Canfield, Paddock and Stone, P.L.C.
Attorneys for Plaintiff Interkal
444 West Michigan Avenue
Kalamazoo, Michigan 49007
(616) 381-7030

FIRST AMENDED COMPLAINT FOR DECLARATORY JUDGMENT AND OTHER RELIEF

Interkal, Inc. ("Interkal"), plaintiff, for its First

Amended Complaint against UIS, Inc. ("UIS"), Defendant, says:

PARTIES, JURISDICTION AND VENUE

1. Interkal is a Michigan corporation with its principal place of business located in Kalamazoo, Michigan. It manufactures bleachers and stadium seating principally for schools and sports arenas in the United States and other parts of the world.

2. UIS, previously named United Industrial Syndicate, Inc., is a New York corporation with its principal place of business located in New York, New York. It is a holding company which, on information and belief, owns several subsidiary corporations engaged in a variety of businesses.

3. This dispute arises out of the interpretation of the indemnification provisions of an Asset Purchase Agreement (the Agreement) dated February 3, 1981. A redacted copy of the Agreement deleting only dollar amounts, is attached as Exhibit A.

4. Interkal is bringing this action on its behalf on behalf of its insurer, The Sumitomo Marine and Fire Insurance Company, Ltd, a Japan Corporation, ("Sumitomo") which defended Interkal in a group of cases arising out an alleged bleacher collapse which occurred at McDonough High School in Charles County, Maryland on or about September 9, 1988 ("the McDonough School cases").

5. Sumitomo has requested Interkal to bring this suit to recover its attorneys fees and amounts paid in settlement of the McDonough School cases, for its benefit pursuant to the terms of its applicable policy of insurance, of which UIS has a copy.

6. Interkal seeks a declaratory judgment, pursuant to 28 U.S.C. § 2201 et. seq. to determine questions of actual controversy between the parties about the terms of the Agreement as more fully described below.

7. Interkal also seeks recovery of $16,101.53 attorney fees and expenses it incurred by reason of the failure and refusal of UIS to honor the Agreement.

8. Interkal also seeks damages from UIS in connection with its refusal to honor the Agreement, which caused Sumitomo to expend $71,672.33 in legal fees, costs and expenses in defending the McDonough School cases, and also caused Sumitomo to pay a substantial sum of money, in order to settle all of the outstanding claims against Interkal. The amounts paid by Sumitomo on behalf of Interkal is to remain confidential by agreement until an appropriate protective order is entered by this court.

9. Jurisdiction is based on 28 U.S.C. § 1332(a) because there is complete diversity of citizenship of the parties and the amount in controversy exceeds Fifty Thousand ($50,000.00) Dollars.

10. Venue is proper in this Court under 28 U.S.C. § 1391(b) (2) because a substantial part of the events giving

rise to the case in controversy occurred in Michigan. The Agreement between Interkal and UIS was negotiated and closed in Michigan. The assets sold under the subject of the Agreement were located in Michigan before and after the sale. Further, the Agreement by its terms is governed by the laws of the State of Michigan.

GENERAL BACKGROUND

11. On and before December 31, 1980, a Michigan corporation then named Interkal, Inc. ("Seller" or "old Interkal") was engaged in the business of manufacturing and selling bleachers and related products from its manufacturing facility in Kalamazoo, Michigan. At that time Seller was a wholly owned subsidiary of UIS, then named United Industrial Syndicate, Inc.

12. On or about January 29, 1981, WFD Holding Company ("Purchaser" or "Interkal") was incorporated as a Michigan corporation to purchase certain assets from Seller.

13. On February 27, 1981, Seller executed and delivered a Bill of Sale to Purchaser pursuant to the terms of the Agreement. A redacted copy of the Bill of Sale, deleting only dollar amounts is attached as Exhibit B.

14. Upon closing, Purchaser changed its name to Interkal, Inc. (Interkal) and amended its Articles of Incorporation to reflect its name change. See attached Exhibit C.

15. Similarly, Seller changed its name from Interkal,

Inc. (old Interkal) to Byzootal, Inc. See attached Exhibit D.

16. On information and belief, Byzootal, Inc. filed a Certificate of Dissolution with the Michigan Department of Commerce on March 10, 1983.

17. On information and belief, UIS, then named United Industrial Syndicate, Inc., was first qualified to do business in Michigan on February 7, 1978. UIS withdrew from the State of Michigan on May 15, 1991, on information and belief, by failing to file annual reports with the Michigan Department of Commerce.

18. The original shareholders of Interkal were former officers and employees of Seller. They formed a corporation to purchase certain assets of Seller to avoid having UIS discontinue the operations of Seller. Because it was acquiring certain assets of seller in difficult economic times, Purchaser was particularly concerned that all liability arising out of products manufactured by Seller, on or before December 31, 1980, remain solely the responsibility of Seller and UIS. Paragraph 22 of the Agreement provides:

> 22. Seller's Indemnity. Seller and UIS agree to jointly and severally indemnify Purchaser against, and hold it harmless from . . . (iv) all damages, claims, losses, expenses, costs, judgments, liabilities and obligations incurred by Purchaser arising out of: (a) any product liability (personal injury or property damage) claim being made against Purchaser arising out of or relating to any product sold and shipped

> by Seller prior to December 31, 1980, whether such claim is based on the direct liability of Purchaser or Purchaser's liability as a successor of Seller; . . . (v) all reasonable attorneys' fees and disbursements and court costs incurred by Purchaser arising out of the foregoing . . .

19. The Agreement also describes the procedure to be followed if indemnification is sought by one party from the other. Paragraph 23 of the Agreement provides:

> 23. Indemnification Procedure. If any claim shall be asserted against any party in respect of which such party proposes to demand indemnification, such party shall notify the other parties to that effect with reasonable promptness after such assertion and such other parties shall have the right to assume the entire control of the defense, compromise or settlement of any such claim, through its own attorneys and at its expense, and, in connection therewith, such party shall cooperate fully to make available to such other parties all pertinent information under its control relating thereto. The party requesting such cooperation shall reimburse the other parties for all Of their costs and expenses incurred in rendering such cooperation. (Emphasis added)

20. The Agreement also requires Interkal to reasonably assist Seller in product liability claims.

Specifically, the Agreement in paragraph 25 provides:

> 25. Product Liability Claims. At the request of Seller, Purchaser shall cause its employees to reasonably assist Seller in preparing Seller's defense to any products liability claim made against Seller. All out-of-pocket expenses and employee expenses incurred by Purchaser in providing such assistance to Seller shall be promptly reimbursed by Seller to Purchaser.

21. Concerning the applicable state law, the Agreement at paragraph 35 provides:

> 35. Law. This Agreement was negotiated in Michigan and shall be governed by and construed according to the laws of the State of Michigan.

22. On several occasions since February, 1981, Interkal has been named as a defendant in a product liability suit involving bleachers manufactured before December 31, 1980. With the exception of the McDonough School cases described below, UIS has defended and indemnified Interkal at its sole expense and has reimbursed Interkal for expenses it incurred in assisting UIS with its defense in each suit.

SPECIFIC CLAIM

23. On or about September 9, 1988, a bleacher manufactured, sold and shipped by Seller to McDonough High School, Charles County, Maryland, before December

31, 1980, allegedly collapsed. Over a dozen students were allegedly injured. Subsequently, at least 16 students filed suit against UIS in the Circuit Court for Charles County, Maryland.

24. Following discovery, 15 students filed an amended complaint naming Interkal as a defendant in addition to UIS. A 16th student later filed one suit naming both UIS and Interkal as defendants. A typical amended complaint is attached as Exhibit E.

25. Interkal promptly requested that UIS defend and indemnify it in each of the actions in which it was added as an additional defendant. See attached Exhibit F. By letter dated October 9, 1992, UIS, Inc. refused to defend or indemnify Interkal with respect to the claims. See attached Exhibit G. As a result, Interkal, Inc. referred the suits to its insurer, Sumitomo, which retained counsel to defend Interkal in the McDonough School cases.

26. Interkal, through Sumitomo, has settled all of the outstanding claims against it with respect to the McDonough School cases for amounts which are to remain confidential by agreement pending entry of an appropriate protective order in this case.

27. As a result of the failure and refusal of UIS to indemnify Interkal in the McDonough School cases, Interkal has incurred attorneys' fees and other expenses in assisting Sumitomo and UIS in defending the McDonough School cases.

COUNT I

CLAIM FOR DECLARATORY RELIEF

28. Since execution of the Agreement, Interkal has assisted UIS in a variety of ways concerning issues relating to bleachers that were manufactured, sold and shipped before December 31, 1980. These bleachers are commonly referred to as being of the "old style Vecta-Brunswick design." Significant design changes were made to the bleachers starting in 1976. Interkal never manufactured the old style Vecta-Brunswick bleachers.

29. Other than with regard to the McDonough School cases, UIS has reimbursed Interkal for expenses incurred in providing support and assistance in defending claims arising out of bleachers sold and shipped before December 31, 1980, and UIS has honored its indemnification obligations under the Agreement.

30. Paragraph 22 of the Agreement clearly and unambiguously requires UIS to indemnify Interkal and hold it harmless from all product liability claims made against it arising out of or relating to any product sold and shipped by Seller before December 31, 1980 whether such claim is based on the direct liability of Interkal or Interkal's liability as successor of Seller.

31. A real case in controversy exists because UIS refused to defend and indemnify Interkal in the Maryland cases on the basis that the claims asserted against Interkal by the plaintiffs in the McDonough School cases consist solely of

allegations of Interkal's own acts of negligence occurring well after the Agreement was signed. It is Interkal's position that the Agreement requires UIS to indemnify it with respect to any direct liability of Purchaser relating to any product sold and shipped by Seller before December 31, 1980.

32. All actions taken by Interkal with respect to products manufactured, sold and shipped before December 31, 1980, were undertaken pursuant to the provision of paragraph 25 of the Agreement and with the knowledge and consent of UIS. The failure and refusal of UIS to honor the Agreement in the McDonough school cases is unconscionable and Interkal believes UIS may breach the Agreement in the future unless this court declares that UIS is obligated under the terms of the Agreement to indemnify and defend Interkal with respect to any other present or future claims arising out of or relating to bleachers manufactured sold and shipped by Seller on or before December 31, 1980.

COUNT II

BREACH OF CONTRACT - DAMAGES

33. As a result of the failure and refusal of UIS to defend and indemnify Interkal in connection with the Charles County, Maryland bleacher cases referred to above, Interkal has incurred attorneys fees and expenses in the amount of $16,101.52 in assisting Sumitomo and UIS under the terms of the Agreement, notwithstanding UIS's breach of the Agreement. Also, Interkal incurred in-house expense in the amount of $3,903.75 in fabricating and shipping a demonstration bleacher for use at trial in Maryland which

should be reimbursed by UIS under the terms of the Agreement. Finally, the refusal of UIS to defend and indemnify Interkal has, on information and belief, resulted in a significant increase in its insurance premiums which increase is expected to continue into the future regardless of the outcome of this litigation.

COUNT III

BREACH OF CONTRACT - DAMAGES

34. Sumitomo expended $71,672.33 in legal fees, costs and expenses to defend Interkal in connection with the Amended Complaints that were filed against Interkal in the Circuit Court for Charles County, Maryland in the actions referenced above.

35. In addition, Sumitomo paid substantial sums of money on behalf of Interkal, its insured, in order to settle all of the out standing claims asserted against Interkal in the McDonough School cases. Because of a confidentially agreement, the sums so paid shall remain confidential until the entry of an appropriate protective order in this case.

36. The expenditure of the monies, fees, costs and expenses by Sumitomo on behalf of Interkal was the direct result of the failure and refusal of UIS to honor its obligation to indemnify Interkal under the terms of the Agreement in connection with the Charles County, Maryland bleacher cases referred to above.

37. Interkal is entitled to recover all damages

sustained by Sumitomo on its behalf in the amounts set forth above as of the date of the filing of this Complaint, and Interkal seeks to recover those damages from UIS, on behalf of Sumitomo, and at its direction, as the damages were the direct and proximate result of the wrongful acts and breach of contract by UIS in failing to defend and indemnify Interkal in the McDonough School cases. WHEREFORE, Interkal prays:

A. For the entry of a declaratory judgment providing that UIS is obligated to defend, indemnify and hold harmless Interkal with respect to any product liability (personal injury or property damage) claim made against Interkal arising out of or relating to any product sold and shipped by Seller before December 31, 1980 whether such claim is based on the direct liability of Interkal or Interkal's liability as successor of Seller, including but not confined to the McDonough School cases referred to above;

B. For a money judgment in the amount of all reasonable attorneys' fees, disbursements, court costs and expenses incurred by Interkal and Sumitomo in defending Interkal in the McDonough School cases;

C. For a money judgment for all sums paid on behalf of Interkal by Sumitomo in settlement of all outstanding claims asserted against Interkal in the McDonough School cases;

D. For a money judgment for all labor, material and incidental costs incurred by Interkal in providing assistance to Sumitomo and UIS in defending the McDonough School cases; and,

E. For a money judgment in the aggregate amount of increased annual premiums for insurance coverage incurred by Interkal as a result of the failure and refusal of UIS to defend and indemnify it in the McDonough School cases.

Dated: May 7, 1996

MILLER, CANFIELD, PADDOCK AND STONE

By: Charles E. Ritter
Attorneys for Interkal
BUSINESS ADDRESS:
444 West Michigan Avenue
Kalamazoo, Michigan 49007
(616) 381-7030

Exhibits to Amended Complaint not printed

APPENDIX I

State of New York } SS:
Department of State }

I hereby certify, that the certificate of incorporation of SUMITOMO MARINE ,MANAGEMENT (U.S.A.), INC. was filed on 09/24/1987, under the name of SUMITOMO MARINE MANAGEMENT SERVICES, INC., with perpetual duration, and that I have made a diligent examination of the index of corporation papers filed in this Department for a certificate, order, or record of a dissolution, and upon such examination, I find no such certificate, order or record, and that so far as indicated by the records of this Department, such corporation is a subsisting corporation.

A Certificate of Amendment SUMITOMO MARINE MANAGEMENT SERVICES, INC., changing name to SUMITOMO MARINE MANAGEMENT (U.S.A.), INC., was filed 08/14/1989.

/S/_____
Alexandro F. Treadwell

APPENDIX J

TRANSCRIPT OF HEARING OF APRIL 26, 1995 ON CROSS MOTIONS FOR SUMMARY JUDGMENT

April 26, 1995, 4:00 P.M.

THE COURT: You may be seated. We have a jury negotiationg -- deliberating, so in the event that we have a note I have to deal with or a verdict during the course of this argument, we'll have to adjourn the argument and I'll have to ask you to step back.

This is the case of Interkal and Sumitomo versus UIS, case 4:94-CV-82.

Enter your appearances, please.

MR. RITTER: Charles Ritter, Your Honor, for Interkal, Inc.

MR. DECARO: Good afternoon. Jeffrey DeCaro, on behalf of Sumitomo Marine.

MR. MCCLEAR: Richard J. McClear, on behalf of UIS, Inc.

* * *

TRANSCRIPT OF HEARING OF APRIL 26, 1995
CROSS MOTIONS FOR SUMMARY JUDGMENT

THE COURT: . . . All right. This is a -- the time set for a hearing on the plaintiffs' joint motion for summary judgment and the defendant's motion for summary judgment and/or to dismiss.

[p. 3]

* * *

THE COURT: All right. The court has carefully considered the competing motions for summary judgment in this case which address or pose the question of whether the defendant had a responsibility to indemnify the plaintiffs with respect to the allegations asserted against the plaintiff in the amended Maryland litigation arising out of the collapse of bleachers manufactured and sold by what the parties refer to as old Interkal or the defendant prior to December 31, 1980, under the terms of paragraph 22(iv)(a) of the indemnification agreement between the parties entered into in connection with the purchase of the assets of the defendant by the plaintiff, new Interkal. In that regard, both parties spend a substantial amount of their respective pleadings and their arguments addressing what the intentions were with respect to the parties at the time this indemnification agreement was entered into and whether subsequent actions by one or more parties or their insurers or the adjusters of those insurers were consistent or inconsistent with such alleged intent. [p. 57]

In this court's considered opinion, the intentions of the parties is relevant in that regard only if the court finds the terms of the indemnification agreement to be ambiguous. In that regard, the court finds that the indemnification agreement clearly provides for indemnification in the case of a product liability claim against new Interkal arising out of bleachers

manufactured prior to December 31, 1980, regardless of whether those claims are asserted as a direct claim against new Interkal or as a successor in interest to old Interkal.

The court finds those terms to be plain and unambiguous and notes that the defendant in this case is unable to point to any wording in the indemnification agreement that is ambiguous that relates to the issue before the court this afternoon withou resorting to arguments with respect to intent and/or subsequent actions. In other words, in this court's opinion, the defendant concedes that the language itself is clear and unambiguous.

[p. 58]